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THE LAW OF DAMAGES.

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THE
LAW OF DAMAGES:

A TREATISE

ON THE REPARATION OF INJURIES,

AS

ADMINISTERED IN SCOTLAND.

BY

JOHN GUTHRIE SMITH,
SHERIFF OF ABERDEEN, KINCARDINE, AND BANFF.

SECOND EDITION.

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PREFACE.

It is nearly twenty-five years since the publication of the *Law of Reparation*, an early study of the subject, faulty and imperfect, and composed of such slender and unsatisfying materials as were then available.

In the interval the subject has grown greatly in importance, for of recent years injuries to person and property have formed a large part of the business of the Supreme Court as well as the Sheriff Court, particularly the latter. But before the time of the present Lord President the cases in the law of damages (with a few exceptions) are of no great value—being often so imperfectly reported as to be rather verdicts than judgments. The true development of the principles of the law began with that distinguished judge who for more than thirty years, with the entire confidence and the cordial admiration of the country, has presided first in the Second and subsequently in the First Division of the Court. During that long time he has been associated in both Divisions with judges conspicuous for learning and ability,—some still living, but others, alas! no more. To trace the method by which the principles of this important branch of our jurisprudence have been elucidated and applied in the present generation to the many questions that have arisen out of the social and economic growth of the kingdom, is a deeply interesting labour. It has obliged me to make this Second Edition, both in structure and arrangement, substantially a new work; but the difficulty of treating a subject so wide in its scope within a moderate compass is great, and with all its additions

and alterations, the book is still far from being either accurate or complete.

I desire to acknowledge the help which I have received from Mr. A. J. M. Morison, Advocate, who has taken infinite trouble in verifying the references and revising the work in its passage through the press. Sheriff Cheyne, and my esteemed colleague, Sheriff Dove Wilson, have been also good enough to revise in proof the forms given in the Appendix, which are submitted as an aid to a much-needed reformation in the style of Sheriff Court pleadings.

J. G. S.

EDINBURGH, *February* 1889.

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THE LAW OF DAMAGES.



CHAPTER I.

GROUND OF RESPONSIBILITY.

Examination of the Action from the Pursuer's View.

Obligations ex delicto.—By damages the law seeks to indemnify a man for the harm which he has suffered through the fault of another. An act wrongful and injurious may be stopped by interdict, and punished if criminal; but the remedy would be inadequate were not the wrong-doer liable also in civil reparation, and therefore the law out of the wrongful act creates an obligation to make good the loss for which he is to blame. Where, however, there is no blame there is no responsibility, for damage by itself gives no cause of action. The loss lies where it falls, unless it can be traced directly to some wrong committed; and this, says Erskine, may arise either “from an act of trespass or a blameable neglect or omission of duty” (a). To these two heads, trespass and breach of duty, every form of actionable wrong is capable of being referred.

Hence it follows that—

I. No liability is incurred in virtue of the ownership of the property which has done the mischief—be it heritable

(a) *Inst.* iii. 1. 13.

or moveable. There are obligations which arise *ex contractu* and *quasi ex contractu*, and *ex delicto* and *quasi ex delicto*, but "I never heard," says Lord Neaves, "of an obligation arising merely *ex dominio*" (a). If, however, the damage was done wilfully, or results from a breach of the duty which the law casts on all persons possessing a ship, carriage, or whatever it may be, to take reasonable care and use reasonable skill to prevent it from doing injury to others, the person in fault is responsible (b).

II. Subject to one important exception, no one is responsible for the act of another. The fundamental principle in the law of reparation is *culpa tenet suos auctores*—meaning that the person by whose fault an injury is caused is liable, and no one else. The exception is—*qui facit per alium facit per se*—the man who employs another to do anything is answerable for the way in which that other does it (c). In England this takes the form of the maxim, *respondeat superior*. The rule, however, is again qualified by certain sub-exceptions. 1. The master is liable for his servant's negligence but not for his malice; and consequently not for his criminal act, civilly or criminally, unless where the act is done—(1) by the master's express command; or (2) within the scope of his employment, and therefore presumably with the master's assent (d). 2. Within the meaning of the rule a tradesman or contractor is not a servant, and (except when the employer, owing duties to the public, leaves their performance to another instead of doing them himself) he is not answerable for the manner in which he does the work. If my coachman runs over a child, I am liable; if I hire a post-chaise, I am not answerable for the post-boy. He is the servant of the coach-hirer, and not mine; and the coach-hirer

(a) *Campbell v. Kennedy*, 3 Co. (*The Khedive*), L. R. 5 App. Ca. M. 121, 125; Lord Gifford, 876, 890.

Pirie v. Mags. of Aberdeen, 9 M. 412.

(b) *River Wear Comrs. v. Adamson*, L. R. 2 App. Ca. 743, 767 (Lord Blackburn); *Stoomvaart v. P. & O.*

(c) Lord Neaves in *Leddy v. Gibson & Co.*, 11 M. 304, 308; *Wardrop v. Hamilton*, 3 R. 876.

(d) *Wood's Master and Servant*, p. 644.

will answer for himself and his post-boy. "The ordinary business of life," says Lord Westbury (*a*), "could not go on if we had not a right to rely upon things being properly done when we have committed and entrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose with prudence and care as being experienced in the matter, and are held responsible for the execution of the work." In ascertaining who is answerable for the wrongful act of a workman we first look to the wrong-doer himself, next to the first person in the ascending line, who is the employer, and has the control of the work; but we cannot go farther back and make the employer of that person responsible (*b*). Were the latter answerable, he would have to interfere from time to time to see that work, of which he knows nothing, was being rightly done by the person to whom it was committed, which would create confusion in all things, and, in fact, be impossible. The relation of employer and contractor, *locatio operis fuciendi*, is not that of master and servant, which is *locatio operarum*. 3. A master is not answerable to one servant for the fault of a co-servant,—an exception to the rule, which will hereafter be treated separately (*c*).

III. The pursuer of an action of damages sues for an injury done to himself personally, in person or property. In England a master may sue for injuries done to his servant by a wrongful act or neglect, whereby the service of the servant is lost to the master (*d*); in Scotland no such right of action is recognised (*e*).

Trespass—Intent.—Trespass in popular speech means the intrusion on what belongs to another; but as used by Erskine in the passage above cited, it signifies the wrongful invasion

(*a*) In *Daniel v. Met. Ry. Co.*, signifying the joint author of a L. R. 5 E. & I. App. 45, 61. *literary work*.

(*b*) Willes, J., in *Murray v. Currie*, (d) Pollock's Torts, 54, i.e. if the L. R. 6 C. P. 24–27. servant is only hurt; but not appa-

(*c*) "Collaborateur" is a droll rently if he be killed outright.

misapplication of a French word (*e*) *Allan v. Barclay*, 2 M. 873.

of another's right. It is the name given to any direct injury to person or property, caused by immediate violence or force—actual or implied; actual as in an assault, implied as in the case of a peaceful but wrongful entry on another's land. It covers all those forms of legal injury which affect a man in the enjoyment of the rights belonging to him as a member of society,—his life, his health, his good name, the right to regulate his own movements, to follow any lawful employment, to enjoy domestic peace and comfort, and to hold private property in all its forms and conditions. It has been justly said that all political freedom is worthless except in so far as it secures the individual in the possession of these fundamental rights, and when they are properly secured human law can do no more for man(*a*). Everything needful to make a man's life happy and prosperous must thereafter under Providence come from his own personal conduct and exertion. The law of damages repairs the *private* harm, the criminal law the *public* mischief, which arises when this just equilibrium is interrupted or destroyed; but in criminal law the essential point to be determined is the frame of mind in which the act charged was accomplished. Every one is taken to know the law, but no one is punishable for violating it unconsciously. The Public Prosecutor undertakes to prove that the accused acted *malo animo*, in the language of the criminal Courts “wickedly and feloniously,” and that all that was done was *intended* to be done,—being prompted either by a culpable spirit of mischief, or a wish to do the particular mischief which was actually done. This is inferred, in the absence of evidence to the contrary, from the acts forming the subject of accusation, for it is a fair presumption that people mean what they say and intend what they do; and separate evidence is not necessary to establish the motive as an independent fact(*b*). The *malus animus* of the criminal law has in the civil law been translated malice—an unhappy word, of which the inconvenience has been frequently pointed out by

(*a*) Phelps, *Law of the Land*.

Trials in Scotland discusses the

(*b*) Lord Cockburn in his *Criminal* doctrine of criminal intent, p. 10.

eminent judges (a). It belongs to the artificial terminology of the English law, and has come to supersede a better phrase, which the law of Scotland had borrowed from the Roman law—*animus injuriandi*.

Legal Meaning of Malice.—Malice is used in two senses—malice in fact and malice in law. The former is the malice of popular speech, spite and ill-will, to be proved like any other fact that is hidden within a man's breast by words and acts. Malice in law signifies whatever is done consciously without just cause or excuse. A blow dealt to a stranger is given of malice,—that is to say, the malice of the act is implied when it cannot be legally justified; and although the legal inference may be strengthened and confirmed by proof of express malice, no such evidence is necessary to sustain the defender's responsibility, civil as well as criminal. It may be, however, that the act was unaccompanied by any criminal intent, being attributable to carelessness on the part of the offender; and in that case, although his civil liability remains, criminally he is free. So a public company may be liable in damages for an assault committed by its orders communicated through its appointed organs,—its managers or directors,—but as the corporation itself has no mind, or memory, or conscience (b), it is incapable of *intent*, and cannot be punished for it.

Again, the foundation of an action of defamation is said to be malice, whether it is a privileged or unprivileged case,—for what is calumnious is presumed to be false, and what is both false and calumnious must have been malicious, when the author of the libel had no call or occasion to speak of the other. But it is well known that a man may be guilty of a libel without malice or improper motive. If a newspaper, by the mistake of an apprentice, transfers a name from the Presentations at Court to the List of Bankrupts, the publisher becomes the means, unconsciously, of doing a grave injury,

(a) *Abrath v. N. E. Ry. Co.*, L. R. 11 App. Ca. 247–253. (b) *Gordon v. B. & F. Metairie Co.*, etc., 14 R. 75.

and though free from any improper motive, is answerable in damages, because his *culpa* renders the act *malicious*. Originally the sin of evil-speaking being a purely ecclesiastical offence, actions of scandal and verbal injury were proper to the Commissary Courts, and the Court of Session left the party injured to such redress as he could obtain there, when no damage was averred to his material interests—apart from wounded honour. The process in the Commissary Court began with a summons drawn up in the form of a syllogism, and setting forth that “albeit the calumniating of any person’s good name, etc., is a crime of a heinous nature,” yet true it is that B. (the defender), casting off all fear of God and regard to his neighbour, has been guilty of the said crime, in so far as, etc.; and then followed conclusions (1) for a sum of money in name of damages and expenses; (2) for the imposition of a fine to be paid to the procurator-fiscal of Court; and (3) for an order on the defender to appear and subscribe a palinode or recantation. In the trial of the case, the main point for decision was the *animus injuriandi*, and for a long time the received doctrine was that when there was no patrimonial loss, an award of damages *in solatium* must be founded on *dolus malus*. But when the case reached the Court of Session, which it might do when there was an averment of actual loss, we gather from the opinions of the judges—in the few decisions which have been reported—that that Court tried the question under an issue of *culpa*, like any other action of reparation, and gave damages whenever the defender (whether influenced by malice or not) had been guilty of negligence, error, or some improper motive, no matter what. Thus, in a case of judicial slander, certain persons having complained that an action of reduction had been instituted on the allegation that they had filled a young man drunk and extracted from him a bond for £2000,—which was all a dream,—the Court were clear that there was no *animus injuriandi*, the action having been raised with an honest desire to get rid of the supposed bond; but notwithstanding, the defender was found liable, as he had acted rashly and incautiously in

bringing the action into Court (a). The case justifies the remark of Mr. Borthwick, that the English technical word malice implies what our lawyers denominate *culpa* (b), and illustrates the marked distinction which is drawn between criminal and civil responsibility by Baron Hume in the following passage: "The criminal is herein distinguished from the civil process,—that to warrant the inflicting of any punishment the *animus injuriandi*, or special malice of the act, must be shown, whereas mere petulance or indiscretion may be the just ground of an award of damages,—though the parties are not even known to each other, if the things said are naturally and in themselves of an injurious tendency" (c).

The law of fraud, as now understood and administered, is another illustration of what has just been said.

In criminal law, the fraud which is indictable imports an intention to deceive; but in the civil action it is not now held to be essential that this should be established. On the principle that *non omne quod licet honestum est*, a distinction was at one time drawn between moral and legal fraud (d); between a lie knowingly told, and a statement which proves to be untrue, made not knowingly but recklessly, in circumstances importing a warranty of its truth. But no such distinction is now recognised; for when a party asserts, for the purpose of influencing the conduct of another, that a thing exists which does not exist, and in reality is without knowledge on the subject, he is not acting the part of an honest man. He leads the other to believe that he knows that which he does not know. A man is therefore answerable in damages for a false statement on proof of *culpa* only, and is liable for what he says, whether he speaks from mere recklessness or a positive intention to deceive (e).

(a) Campbell of Blytheswood's case, mentioned by Lord President in *Græme & Skene v. Cunningham*, 1765, M. 13,923.

(b) Borthwick on Libel, 195.

(c) 1 Com. (3rd ed.) 342.

(d) *Murray v. Mann*, 2 Exch.

538; *Polhill v. Walter*, 3 B. & Ad. 114.

(e) *Smith v. Chadwick*, L. R. 20, Ch. D. 27. Lord Kenyon gets the credit of inventing this curious distinction, which subsequently found its way to Scotland through the

Every right is subject to certain necessary limitations. It is not true that a man may do what he likes with his own. In the management of his property he must not act *in emulationem vicini*. He must also respect the conditions required by the safety of the public—the rules of good neighbourhood, and the peace and comfort of the district in which he lives. So with the exercise of legal remedies. They are a valuable part of the privileges of citizenship, and so long as they are honestly exercised, and not for the attainment of some indirect collateral object, they may be lawfully used without regard to the consequences. But evidently it is just as easy to accomplish another's ruin by the wrongful use of legal machinery as by any fraudulent contrivance that malignant ingenuity could devise. The law accordingly draws the line between an honest and dishonest use of such remedies as Interdict, Arrestment, and generally of legal process in its various forms. Inasmuch as the right is capable of being employed in an *oppressive* manner, its use is only lawful so long as it is accompanied by *bona fides*: whenever the *bona fides* is wanting its use is held to be malicious, and to entitle to damages.

The malice, however, which is here spoken of is not personal ill-will. From the existence of the one we may infer the existence of the other; and once hatred is shown to exist, it may be taken that the act was prompted by no good motive, and not much evidence will be needful to establish *mala fides*. But malice in fact, alone and apart from the act, will never entitle to damages. For what is lawful between friends does not become unlawful by their being enemies; were it otherwise, things which beyond doubt give no cause of action would infer liability,—as when a tradesman opens a shop, and by underselling a rival seeks to drive him from the field, not for the sake of gaining any benefit to himself, but of doing him perhaps an irreparable injury; or when a creditor presses his debtor for pay-

House of Lords in *Smith v. Royal* kindly to the soil. See *Miller v. Bank*, 1 Dow 272, but never took *Geils*, 10 D. 715.

ment, not because he needs the money, but wishes to make him bankrupt.

Nay, a man may set the criminal law in motion against one to whom he entertains an ill-will, from no desire to vindicate public justice, but to gratify his own personal spite; yet he is only doing his duty to society, and is guilty of no wrong, even when the prosecution breaks down, if there existed reasonable grounds for the accusation. Proof of malice is insufficient. Proof of the absence of reasonable and probable cause is also insufficient; but both combined—that is to say, when the defender knew, or with proper care might have known, that there was no probable cause—renders him liable in damages. In such a case proof of malice in fact is relevant, because it displaces the presumption that he acted from an honest motive, and is confirmatory of the inference to which the other facts lead, that the prosecution was instituted “maliciously, and without reasonable and probable cause.”

Again, the use of arrestments or inhibition is often necessary for a creditor’s protection, and although it may affect seriously the common debtor’s credit, it is always open to him to obtain a recall of the diligence by paying, or consigning, or tendering security for the debt. But when the proceeding is incautious and unnecessary,—taken with a view to damaging the other’s credit, or causing him annoyance and inconvenience in his business relations,—the creditor is answerable in damages, because he is held to have acted “maliciously, and without reasonable or probable cause” (a).

It thus appears that whenever the word malice occurs as the essential ingredient in the action for civil reparation, it is simply intended to express what is summed up in the words of the Roman Law—“*ubicunque vel dolo, vel culpa, damnum datum ibi locum habet actio*” (b); and to enable the Court to judge of the relevancy of an action founded on a malicious abuse of a right or privilege, it is a recognised rule of plead-

(a) *Wohlthecker v. North Ag. Co.*, 1 M’P. 211.

(b) See *Inst. lib. iv. tit. 3.*

ing that such words as "malicious" and "fraudulent" are without meaning, unaccompanied by a detail of the facts from which the existence of the improper motive may be inferred (*a*).

Civil and Criminal Remedy.—The civil and criminal process differ in their object, methods, and result. The object of the criminal law is punishment; of the civil, indemnification; the one interferes in the public interest with a view to prevention of the *public* mischief, the other interferes only at the suit of a private party for the purpose of restoring the *status quo*. In the infancy of jurisprudence the latter was naturally considered the more important of the two; and the want of a defined criminal code was partially supplied by investing the private suit with a penal character. The delinquent was condemned in double or treble the value of the injury, as a payment to the person injured; and the action was made to serve the twofold purpose of an action of damages and a criminal prosecution. At that time the reparation of all injuries was made not in money but in kind. If an article was injured or destroyed, it was replaced by another as good; the man who suffered his cattle to trespass, was required "of the best of his own field and of the best of his own vineyard to make restitution" (*b*). And it was enacted, "For all

(*a*) *Scott v. Turnbull*, 11 R. 1131; *M'Murchie v. Campbell*, 14 R. 725; *Craig v. Peebles*, 3 R. 441; *Watson v. Baxter*, 24 D. 494; *M'Intosh v. Weir*, 2 R. 877; *Urquhart v. Grigor*, 3 M. 283.

(*b*) Ex. xxii. 5. The principle here stated, that damage should be made good in kind (*in natura*), seems to have been generally recognised in those ancient days. Thus in Roman law before the *Lex Aquilia*, under the law of the XII. Tables, the owner of trespassing cattle, by the action *de pastu pecoris*, was required to cede part of his crop to

his injured neighbour. So, when a house or stack of corn was burned down through negligence, the person in fault was bound to make good the damage in kind (*noxiam sarcire*), provided he was not insolvent, in which case he was ordered to be whipped. D. 47. 9. 9. As regards injuries to life or limb, the *lex talionis*, like for like, prevailed; but injuries to property were compensated *in natura* by repairing the damaged article, or giving another equally good. Grueber's *Lex Aquilia*, 188, 189.

manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing which another challengeth to be his, the cause of both parties shall come before the judges, and whom the judges shall condemn he shall pay double unto his neighbour" (a). When Scotland first settled down under an organized government, this practice was reversed. The judge who tried the prisoner criminally, settled the question of pecuniary reparation at the same time (b). Not only in ordinary assaults tried before the inferior magistrates was this the course followed, but in other courts also, and the practice of the Commissary Court in verbal injuries is an example of the combination of the civil and criminal remedy in the same action which survived to comparatively recent times. The Assythment awarded by the High Court of Justiciary in cases of homicide to the widow and children of the person slain is another instance of the practice, and probably in a rude age when public justice was so often defeated by the influence of the Crown—the power of the chiefs—and the lawlessness of the clans, it was not without its advantage (c).

(a) Ex. xxii. 9.

(b) See the Acts 1424, c. 33, and 1425, c. 51. The former, dealing with trespass, enacts that the party convicted shall pay 40s. to the king, and "assyth the partie skaithed." The latter deals with forethought, felony, chaud-mella, and enacts that as soon as complaint is made to justices, sheriffs, and bailies, they shall diligently inquire therein, and if the guilt of the prisoner is established, they shall "gar the partie hurte be fullie assyithed after the quantirie of skaith that he has susteined."

(c) In *Steuart v. Story*, 25 Jan. 1785, 9 F. C. App. p. 9, 5 Br. Sup. 646, the indictment was at the instance of the son and father of the deceased, and the Lords found the panel "liable in an assythment to John Steuart, private prosecutor, for himself and in

behalf of the other nearest of kin."

It was decided in *Moodie v. Stuart*, 12 June 1741, 5 Br. Sup. 709, that "assythment included not merely expenses and aliment to those in need of it whom the deceased was bound to aliment, but likewise something in solatium to the relations for the loss they had sustained." Lord Stairsays, "Reparation is either by restitution of the same thing in the same case that it would have been in if it had remained with the owner, and this is most exact; or where that cannot be, by giving the like value or that which may come nearest to make up the damage. And if none be found fitter, reparation must be made in money, which is the common token of exchange, and hath in it the value of every estimable." St. i. 9. 4.

But under our modern system of public prosecution the private instance has fallen into disuse; the Commissary Court has long ceased to exist; and the civil and criminal process have no longer any relation to each other further than this, that to entitle a party to damages for a criminal prosecution, the sentence of which he complains must first of all be set aside by the proper criminal Court, if the prosecution in the Court of first instance has not altogether failed,—the reason being, that it is beyond the power of one Court to look behind the decrees of another Court of co-ordinate jurisdiction, and examine the grounds on which the judgment proceeded.

Consequences of the above Distinction.—This distinction between the civil and criminal process leads to important consequences. (1) While in the criminal action the *intent* is the main question, in the civil it is the fact of damage, and whether it can be legally justified. The “intent is immaterial if the act be injurious to another” (a), and so an infant or a lunatic is liable for his tortuous act (b). (2) The object of the one is punitive, of the other to make up the loss which has been sustained. But while the sum awarded should bear a reasonable relation to the harm suffered, juries are not expected to have any compassion for certain classes of wrongdoers, or to “weigh in golden scales” the amount of injury done. Proof of malice is always relevant to enhance the damages; and in cases of adultery, seduction, and breach of promise, fraud, and the oppressive use of legal diligence, what are called vindictive damages may be given with which the Court will be slow to interfere, unless the jury have been carried away by their feelings, or proceeded on a wrong principle in making their award (c). (3) If more persons than one are concerned in a delinquency, each criminally is answerable only for himself; but civilly they are all held to

(a) Per Lord Kenyon, C. J., *Haycraft v. Creasy*, 2 East 104.

(b) Broom's Comrs. (7th ed. 599, 709).

(c) *Ib.* 893.

be co-obligants, liable in reparation *singuli in solidum*. And (4) as the one object of the penal action is punishment, it necessarily falls by the death of the delinquent; but the civil consequence of a wrongful act is the creation of a debt, capable of being enforced against the wrong-doer's estate after his death, and transmissible like any other debt to the representatives or assignees of the injured party (a).

Death of Party—Title of Executor to sue.—By the Roman law penal actions generally, and also certain others, whether arising from contract or wrong, died with the debtor, and were not competent against his heir. In England, by force of the rule *actio personalis moritur cum persona*, survival of an action against an heir was the exception, and non-survival the rule; but in modern times the maxim appears to have been gradually restricted, until the phrase "*actio personalis*" is "now understood of a tort merely." The theory seems to have been that an executor represented the estate and the debts but not the person of the testator, and it was unjust to make him stand in the place of the dead man as regards injuries which had been of no gain to the estate, when no one could tell how they might have been discharged or answered by the testator himself if he had lived. The law laid down by Lord Mansfield was that all private injuries and wrongs, as well as all public crimes, are buried with the offender (b); and quite recently the maxim was successfully invoked to get rid of an action for breach of promise of marriage, which had been brought by a woman after the man had died (c).

In Scotland the English rule has never been received as law. Erskine says, "If the delinquent should die, an action of damages lies against his heirs or representatives; for although penalties are not transmissible against a delinquent's heirs, yet, as the reparation of damages is grounded on an obligation merely civil, the heir of the person obliged must be subjected to it" (d). In two cases which occurred in 1809

(a) *Auld v. Shairp*, 2 R. 191.

(c) *Finlay v. Chirney*, 20 Q. B. D. 494.

(b) *Hambly v. Trott*, 1 Cowp. 375.

(d) *Ersk. iii. 1. 15*.

this doctrine was affirmed. In the first of these (a) the pursuer had been injured by a pistol-shot fired by Angus Robertson, who died before any action had been raised. After his death an action was raised against his brother as his representative for the injuries received from Angus' delict. It was argued for the defender that unless *litiscontestation* had taken place before the death of the person injured, no action was competent against his representatives except in so far as the estate of the defunct was *locupletior* by his delict. The answer held by the Court to be conclusive was that while a penal action brought *in terrorem* or *ad vindictam publicam* was personal to the offender, seeing that its one object is punishment which could only be inflicted upon the delinquent, an action for compensation of the loss was a civil claim transmissible against an heir like any other debt, because to the extent of the patrimonial loss of the one party a civil debt *ex presumptu contractu*, although actually *ex delicto*, is created against the other. The other case (b), which came before the Court about the same time, was an action against the representatives of a messenger-at-arms for mal-execution of his office, and the Lord President Blair laid it down that, under the law of Scotland, when damage had arisen by delinquency, the right to reparation was a debt which was no more extinguished by the death of the debtor than any other debt. In this last case, however, the Lord President hinted that in his view the claim was not maintainable for aught but actual patrimonial loss. "If," he said, "it should appear that the debt could not have been recovered if the diligence had been executed, then it might be said that this was a claim beyond damages, and of a penal nature."

Solatium.—The direct personal interest requisite to entitle a pursuer to insist in an action does not necessarily mean one of a pecuniary or material kind. Many a wrong produces no

(a) *Macnaughton v. Robertson*, 1809, F. C.; *Davidson v. Tulloch*, 17 Feb. 1809, F. C. 3 Macq. 783.

(b) *Morrison v. Cameron*, 25 May

other result than mere distress of mind, and it would be unfortunate were the wrong-doer to escape by showing that his victim had been nothing out of pocket through the delinquency. Therefore the law of Scotland, differing from the law of England and some other systems, recognises injury to feelings, apart from patrimonial loss, as a ground of action. Not unfrequently the circumstances admit of a slump sum being claimed in name of both solatium and damages, and in such a case solatium is a mere equitable extension of the reparation which would be otherwise claimable (a). But even where there is no patrimonial loss, solatium by itself will be sustained as a separate and sufficient ground of action. When, however, the cause of action is a libel on the memory of a man's deceased parent (b); or a defamatory letter sent to himself, and never seen by anybody but the writer and the person to whom it was addressed; or an unsuccessful attempt on a married woman's honour (c),—it is a doubtful question whether the claim for *solatium* only, and unsupported by other loss, survives in favour of the heir of the injured person. Lord Ivory, speaking in the year 1846 (d), said he knew of no case where mere solatium, taken by itself, was ever sustained as a substantive and exclusive ground for civil damages; and it is certainly an odd result that a man should descend to the grave with his griefs buried with him, while a stranger draws comfort and consolation for pain which he has never felt and never known. In a recent case the First Division decided (Lord Shand dissenting), that between real damage and solatium there was no real distinction, and a claim for solatium merely does transmit against the representatives of the wrong-doer. Their lordships, however, did not decide that solatium transmits from the original sufferer, so as to make an action maintainable at the instance of his representatives (e); and in a case which occurred in the other

(a) Lord Ivory in *Greenhorn v. Adie*, 17 D. 860, 867.

(b) *Walker v. Robertson*, 2 Mur. 516.

(c) *Charteris*, etc., cited, 2 Hume 123.

(d) *Greenhorn*, *sup.*

(e) *Evans v. Stool*, 12 R. 1295.

Division, in which a ship captain was sued for damages on account of alleged cruel treatment of an apprentice, who had since died (but not from his injuries), opinions were expressed against the title of the executors to insist in such a claim. Lord Adam had sustained the title to sue, and as the parties had acquiesced in the Lord Ordinary's judgment, the point did not require to be decided; but Lord Young said his impression was against the title of the executors; Lord Craighill said the case must not be taken as a precedent; and Lord Rutherford Clark said he considered the plea to the title good (*a*).

It will be observed that this is a different case from an action founded on domestic bereavement. There distress of mind forms a good ground of action, for it is the pursuer's own. A widow is entitled to damages for the death of her husband, a son for the death of his father, and *vice versa*. Frequently a patrimonial interest may be presented in such cases, as well as a mere claim of solatium. But should the contrary of this be the fact, it is no answer for the defender to show that the party was a burden instead of an advantage to his family, and that his death was a blessing instead of a misfortune,—that the deceased wife was drunken in her habits, or that the father who was killed had to be supported by his family (*b*). Evidence on these points may affect the quantum of damages, but does not traverse the right. The pursuer of such a process, according to the beautiful language of the Roman law, *causam agit doloris*; and the breach formed in the domestic circle is of itself sufficient to maintain the action. But the claim is not competent to collaterals, for

- (*a*) *Wight v. Burns*, 11 R. 217. In 9 S. 31, 6 W. S. 566, in which Lord Milne *v. Gauld's Trs.*, 8 D. 345, a wife who had suffered wrongous imprisonment during her husband's life, brought an action of damages after his death, which was thrown out on the ground that the claim fell under the *jus mariti*, and passed to his trustees; but the decision was opposed to *M'Kenzie or Cullen v. Ewing* (1830), Wynford said injury to a married woman's character survives to her in the event of the husband's death, and was overruled in *Smith v. Stoddart*, 12 D. 1185; *Gale v. Bennet*, 19 D. 665; *Thoms v. Bridges & M'Queen*, 19 D. 721.
- (*b*) *Elder v. Croall*, 11 D. 1040.

out of the direct line the cause of action is too remote (*a*), whether the action is founded on solatium simply or actual pecuniary loss (*b*).

Legal Duty—Absolute or Limited.—A legal duty is either (1) absolute, or (2) limited to taking care.

When it is absolute there is no room for any question as to motive, excuseableness, or inexcuseableness. The party bound has no option but to obey. It cannot be delegated to another. Do it he must, and if not done he is answerable at his peril. Such a duty may arise either by statute or common law. A harbour authority, for example, empowered to buoy the channel leading to the harbour beyond its limits, was found liable in damages for failing to mark or remove the wreck of a ship which had sunk in the channel, and thereby caused damage to another vessel making for the harbour (*c*). When the Presbytery of Auchterarder refused, against the protest of a minority, to take the presentee on trial after he had been “vetoed” by the congregation, it was said in the House of Lords that beyond doubt the majority were liable in damages to the patron and presentee for refusing to perform their statutory duty (*d*). In the case of public bodies, words in a statute, which seem to be merely permissive, are read as imperative, whenever the authority conferred is to do an act which the public interest demands for the protection of individuals. The power being to be exercised for the public benefit, becomes a duty (*e*). But when the duty committed to the public body is of such a nature as to leave a discretion regarding the time and mode of its exercise,—*e.g.* the drainage of a village under the Public Health Act,—they are answerable for malfeasance only; that is to say, their duty is simply to take proper care

(*a*) *Greenhorn v. Adie, supra*; *Eistens v. N. B. Ry. Co.*, 8 M. 980.

(*b*) *Pridie v. Dick*, 19 D. 287.

(*c*) *Dormont v. Furness Ry. Co.*, 11 Q. B. D. 496. So Lord Moncreiff in *Buchanan v. Clyde Trs.*, 11 R. 531.

(*d*) *Ferguson v. Kinnoul*, 1 Bell's Appeal Cases, 662; *Birrell v. Anstruther*, 5 M. 20 (failure of heritors to provide parish teacher with suitable dwelling-house).

(*e*) *Forbes v. Lee Conservancy Bd.*, L. R. 4 Ex. D. 116.

and caution in the exercise of their functions; and in the general case, no one as a matter of social obligation is expected to do more. So long as he acts within his rights, he warrants, not the safety of others, but only that everything shall be done to secure safety which reasonable care and skill can accomplish.

Warranty of Safety.—This doctrine, however, only applies to such operations as with due care involve no risk. When we say that a man is bound to exercise proper care in the management of his property, we may mean several things—that he shall keep within the limits of ownership by respecting his neighbour's right to adjacent and subjacent support,—that he shall abstain from all hazardous operations,—and that he shall use due care in the execution of what is not hazardous. The distinction illustrates the flexible character of the word *culpa*. It is fault to attempt certain things at all; it is fault to attempt others without proper precautions; but in this last case, if due precautions are taken, or the work has been handed over to a competent contractor, whose business it is to manage matters of that character, the owner's duty is fulfilled, and the contractor is the person responsible when accidents happen (*a*). Such questions are constantly arising in connection with building operations in our large towns. The demolition and reconstruction of tenements are part of the natural growth of our cities, and cannot be avoided; but in nine cases out of ten it can be shown that no damage would have been done, but for the builder's personal negligence. He has either forgotten to fence off an obstruction on the street when the operations were in progress; or neglected to rail off a sunken cellar into which some one has fallen; or failed in some way to secure the stability of the structure. All such matters may be properly left to a contractor, and the employer is not answerable for his negligence (*b*).

(*a*) *Buchanan v. Andrew*, 2 H. L. Co., 12 D. 887; *Chapman v. Parlance*, 3 S. 585.

(*b*) *M'Lean v. Russel, M'Nee, &*

The burden, however, is on the owner to show that, as far as he was concerned, the work was of the description here indicated; for whenever it appears that there was risk, the risk should be his, not that of his neighbour. The operation was believed to be practicable; it is not unlawful; but he acts at his peril; and the test is, Was it suggestive of danger even if carefully conducted? When the undertaking is of such a sort that in the natural course of things injurious consequences may, and unless extraordinary precautions are taken probably will arise, the owner is not relieved from responsibility by the employment of a contractor. His obligation is not quite that of an insurer; he is not liable for injury, no matter how occasioned; but he is liable for any want of prudence or caution, even though it may be *culpa levissima* (a). It is held that, standing as he does towards his neighbour, a man engaged in operations which involve a certain risk is bound to provide, not absolutely that no damage should follow, but that reasonable care and skill shall be used to prevent it,—a duty which he cannot hand over to any third party.

This important principle, that in many cases a man shall act only at his peril, was first clearly settled in Scotland in *Burton v. Moorhead* (b). The pursuer, when proceeding by a private road which led past the defender's house, was attacked by a savage dog which flew at him, broke its chain, and bit him severely in the leg. It was proved that the dog was dangerous, and had already shown a propensity to attack and bite people. The defender argued that he was entitled to keep such a dog, provided that he took reasonable and proper precautions to restrain it; and as the chain was only two years old, and appeared to be of adequate strength, he had been guilty of no negligence. On this question Lord Moncreiff said, "If the liability of the defender depended on his having taken reasonable precautions to restrain the dog, I should think that he had very good grounds to prevail. But that view depends, I think, on a misapprehension of the

(a) Per Lord Fitzgerald in *Hughes v. Percival*, L. R. 8 App. Ca. 443, 455.

(b) 8 R. 892.

true principle of his duty. It seems agreed that where an owner of a dog has no reason to suppose that it is ferocious, the mere fact that it has turned out to be so would not make him liable for anything it has done. The dog has, in fact, the privilege of one worry. But when the ferocity of the dog is quite well known to the owner, his obligation is not one of reasonable care, but not to keep the dog at all, unless he does it in such a way as to make it perfectly secure. The distinction is most clear, and therefore the owner of the dog keeps it at his own risk. He does not undertake that he will restrain the animal, but he must restrain; and if he does not, he will be responsible for its acts." And Lord Young added, "There is no necessity for a man to keep an animal of this kind dangerous to human beings. He may lawfully keep it, but the risk shall be entirely his. It is different when there is a criminal question in the matter, and not merely one of damages; for when a man is sought to be made criminally responsible, then the question of reasonable diligence will be entertained."

The principle of this decision was subsequently applied to the case of a boar which was kept in a sty from which it could easily escape (*a*). "And generally with respect to animals either savage by nature or easily infuriated, like a bull or a stallion, the owner takes the risk of their straying on the highway unattended, or getting into a field through which there is a right of way. Morally he may be free from blame, but he is answerable if any harm happens to a member of the public" (*b*).

The rule deducible from many recent cases is, that the principle is the same whether what causes the damage is animate or inanimate (*c*). A person bringing anything on his land which if it escape may cause damage, is responsible if it do escape, notwithstanding he may take every precaution to prevent it (*d*). When a man had brought on

(*a*) *Hennigan v. M'Vey*, 9 R. 411.

(*c*) *Kerr v. Earl of Orkney*, 20 D.

(*b*) *Clark v. Armstrong*, 24 D. 298.

1315.

(*d*) *Chalmers v. Dixon*, 3 R. 461.

his property a hazard which did not exist before, namely, a
 bin of combustible mineral refuse which spontaneously
 ignited and emitted noxious vapours to the detriment of the
 houses of the neighbourhood, he was found liable in
 damages.

In this last case the Court followed and applied the
 decision of the House of Lords in *Rylands v. Fletcher* (a).
 For the purpose of feeding a mill the defender constructed a
 reservoir on his own land, in ignorance of the fact that at
 some remote period the coal beneath had been worked out,
 and when the reservoir was filled the water found its way
 through certain fissures into the disused shafts and flooded
 the mineral workings of an adjacent owner. The reservoir
 had been carefully built under the direction of com-
 petent engineers, but nevertheless the defender was held
 liable. The same holds as to the building of a dam
 which gives way during a flood in the river caused by an
 exceptional rainfall; the escape of sewage which, percolating
 through the water-bearing strata, contaminates a well;
 or any noxious effluvium which poisons the air that
 we have all a right to breathe. In all these cases
 the proprietor who is answerable commits an actionable
 wrong (b).

The distinction between the uses to which property may
 be put, as "natural and non-natural," is not very precise; but
 the meaning is, that everything outside those ordinary opera-
 tions which are common on property similarly situated shall
 be regarded as special and exceptional, and impose on the
 owner the obligation of an insurer; whereas in the ordinary
 case, when he is using his property in the ordinary way, he
 is only liable for negligence.

To this head may also be referred the rules which govern
 the use of dangerous machines. When a railway company is
 authorized by statute to use steam power, the running of
 locomotives is a lawful act, and no damages are due for

(a) L. R. 3 E. & I. Ap. 330.

(b) *Ballard v. Thomson*, 29 Ch. D. 115.

injuries caused by sparks, unless the company in the construction of their engines has negligently failed to keep pace with the improvements of the day (*a*). But when the locomotive is started on a public highway (*b*), or there is no statutory authority for the use of steam power on the railway (*c*), the case is governed by the principle that no one is allowed to use a highly dangerous implement, except on condition that he shall himself stand to all risks, and pay for any damage which the public may suffer in consequence.

The Duty of Care.—Failure to act with due care and caution, which is in England and America called *negligence* and in Scotland *fault*, is the *omissio diligentiae*,—the failure to take the care which in a mixed community every one is bound to take, in the conduct of himself and the management of his property, to prevent harm to others, and which is embodied in the maxim, *sic utere tuo ut alienum non lædas*.

In the exercise of a common right, such as that of riding or driving on the public highway, we must act with a due regard to the common safety; and as already observed, operations on our own property, hazardous or non-hazardous, ought not to be undertaken without proper precautions to prevent injury during their execution. "When," says Lord Selborne, "one man's property stands in such a position to another man's, that by certain modes of using it he might destroy the property of the other, his own rightful use over his own property is limited by the obligation which he is under not to destroy the property of his neighbour" (*d*). No man is entitled to dig in his own ground so near the boundary as to let his neighbour's land down. Were it otherwise, the result would be the mutual destruction of both

(*a*) *Murdoch v. G. & S.-W. Ry.*,
8 M. 768.

(*b*) *Powell v. Fall*, L. R. 5 Q. B. D.
597.

(*c*) *Jones v. Festinoig Ry.*, L. R. 3
Q. B. 733.

(*d*) *Buchanan v. Andrew*, 11 M. (H.
L.) 18.

subjects. But the law preserves both entire by giving each owner only such a right of use as is compatible with the safety of the other.

The Roman doctrine of Culpa.—The diligence which a man uses in his own affairs is a fact which may be fixed with fairly reasonable certainty, but we may easily imagine a stricter carefulness (*exactissima diligentia*) than is furnished by this standard. The Roman lawyers accordingly considered responsibility as of varying degrees, according as the contract forming the legal relation between the parties was gratuitous or onerous. They distinguished between ordinary or slight negligence (*culpa levis*) and the graver fault (*culpa lata*), which bordered on fraud and malice (*culpa lata quæ equiparatur dolo*) (a).

A person bound by contract or quasi-contract was sometimes liable only for *dolus* and *culpa lata* (e.g. a depositary), sometimes for *omnis culpa* or *culpa levis* (e.g. the *mandatarius commodatarius*), sometimes for the so-called *culpa in concreto*, i.e. the omission of the care which the party was accustomed to take of his own affairs (e.g. the *socius*) (b). But under the Aquilian statute the least neglect entailed liability (c), and in our modern law of damages, which is largely founded on this celebrated edict, the same rule is followed. The only question in every case is, whether the defender's blame, be it great or small, was the cause of the loss which was sustained. The defender is either to blame or he is not; and, although in popular speech we may attempt to discriminate between ordinary and gross negligence, that is simply a descriptive phrase, useless for the purposes of legal definition (d). It is sometimes forgotten

(a) "I adopt Lord Mackenzie's view (Roman Law, 186), which blots out the distinction between *c. levis* and *c. levissima*," Lord Neaves; also Lord Cowan in *M'Intosh v. M'Intosh*, 2 M. 1357.

(b) Arndts, § 250; Grueber, p. 222.

(c) This is the meaning of the

text: "In lege Aquilia et levissima culpa venit." D. 9. 2. 44, pr.

(d) "I said I could see no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet," per Rolfe, B., in *Wilson v. Brett*, 11 M. & W. 113, 115; *Beal v. South Devon Ry.*, 3 H.

that negligence is not a positive, but a negative word ; it does not define the duty owing by one person to another, but expresses the breach of the duty ; and the inquiry thus resolves in every case into a question strictly personal to the parties concerned, and liable to be modified by many considerations depending on who the party is who complains that his safety has not been duly attended to ; visitors, for instance, unacquainted with the premises, when the action is founded on the condition in which they were kept ; workmen familiar with them ; licencees who resort to them at their own risk ; grown-up people who can take care of themselves ; young persons who cannot ; and young persons who had no business to be there at all. In every case, the point to be decided is, whether in a question, not with the public, but with the particular individual injured, the defender did all that he was bound to do, to prevent the mischief which happened.

Negligence.—It thus appears that negligence is something more than a mere error of judgment. It does not consist in failing to judge aright, but in failing to apply the mind, and act with becoming energy in the situation in which he stood. The most careful men, when trying to do their best, may be deceived by appearances, and fall into a mistake natural in the circumstances. Further, no accident ever occurred without being abundantly suggestive of means by which it might have been avoided ; and in reviewing his conduct after the event, it should be remembered that he was without the experience gained from the event itself. "It is not sufficient," said Lord Justice-Clerk Inglis, "to subject a party to liability for the consequences of an accident when people after the accident see how it might have been prevented, and say that he was bound to have seen that before the accident. There are many precautions adopted on the teaching of accidents such as this, and yet the omission of such precautions may

& C. 337 ; *Grill v. Gen. Iron Screw* negligence in the abstract," per L. J. *Collier Co.*, L. R. 1 C. P. 600. Bowen in *Thomas v. Quartermaine*, "There is no such thing as negli- L. R. 18 Q. B. D. 685, 694.

not amount to that want of due precaution or that neglect for which an employer is responsible" (a).

Moreover, a man called to act in a sudden emergency may make a blunder, without being justly chargeable with culpable negligence. Suppose, for instance, a shipmaster at sea finds his vessel leaking, and it becomes a question whether he ought to return to port or proceed on his voyage. If, after consultation with his officers, he comes to the conclusion, honestly, but erroneously, that, considering the state of the weather and other circumstances, he may be able to accomplish the voyage, the owners will not be liable for the goods on board on the ground of the master's negligence, if the vessel afterwards founders (b). So, if the driver of a carriage pulls the wrong rein, the fact would be some evidence of negligence; but it would be much less cogent if at the time, when going quietly and in the ordinary way, the horses had been startled by the driver of a passing vehicle suddenly cracking his whip. As has been observed (c), "a man may not do the right thing, nay, may even do the wrong thing, and yet not be guilty of neglect of his duty, which is not absolutely to do right at all events, but only to take reasonable care and use reasonable skill."

This duty of watchfulness is, of course, proportionate to the magnitude of the risk. The driver of a vehicle is not expected to do more than look before him for some yards; but in the navigation of a ship at sea, the look-out is constant, and extends for many miles. A passage in the Digest states clearly the rules which are still of daily application,—

"If a man who is lopping branches from a tree and has flung one down,—or if a workman on a scaffold has killed a slave who was passing by,—he is liable, if the branch falls into a public place, and if he has not given warning by calling out, so that its fall might have been avoided. But if there is no

(a) *Finnigan v. Peters*, 23 D. 260, 264.

(b) *Cohn v. Davidson*, L. R. 2 Q. B. D. 455.

(c) Per Lord Blackburn in *Stoomvaart Maatschappij Nederland v. P. & O. Co. (The Khedive)*, L. R. 5 App. Ca. 876, 891.

path or way across the land, the man lopping the branches will be liable only for *dolus*, i.e. he may not fling a branch down upon a person whom he sees passing; for it would not be fair to make him liable for *culpa* (viz. *levis*), as he could not have foreseen that any one would have been passing by that place" (a).

We have here clearly set forth the distinction between *dole* and *culpa*, — the one being an act done wilfully or wantonly, and therefore in law *malicious*; the other an act of carelessness, unaccompanied by any evil purpose, and excusable or inexcusable according to a standard which is easily recognised, namely, whether in the situation in which the party stood the danger was so likely to occur, as to suggest the duty of taking steps to provide against it, which were omitted. What if the defender replies,—That though doing his best to do his duty on the occasion, he failed to see the danger? According to the Roman law such an answer was irrelevant, the law taking no notice of the idiosyncrasies of an individual—that he was deaf and did not hear, or near-sighted and failed to see. The measure of responsibility must be found in some more general standard, which was this, Could the danger have been foreseen by an ordinarily careful man? (b). Every man, whatever his personal defects, is presumed to have as much capacity to judge and foresee consequences, as a man of ordinary prudence would have in the same situation. "If," says the Supreme Court of Massachusetts, "a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him" (c).

Some purely objective standard as this is so necessary, if the question of liability is to be decided as one of law at all, that it is surprising to find that in England it was solemnly debated and formally determined so lately as

(a) L. Aq. 31, pr. Grueber, 128. cum periculum evitari non possit."

(b) "Culpam autem esse, quod cum Lex. Aq. 31, pr.

a diligente provideri poterit, non esset (c) *Commonwealth v. Pierce*, 52 Am. Rep. 264, 266.

the year 1837. In *Vaughan v. Menlove* (a), the defender had stacked hay in a condition that made ignition so likely, that some of his neighbours advised him to take it down, so as to prevent all risk of fire. There were, however, conflicting opinions on the subject, and the defender said he was insured, and "would chance it." The stack did take fire, and having been built close to his boundary, some adjacent cottages on the other side of the fence were burned down. The question which he desired to put to the jury was whether he had acted honestly and *bona fide* to the best of his judgment. But the Court said, "Instead of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

When the fault charged is an act of omission, the decision in general will be found to turn on the answers which may be given to three questions which were once put by Lord Westbury in a collision case. To find the defender liable, it should be established—(1) That the thing omitted to be done, was clearly within his power; (2) that if done, it would in all probability have prevented the accident; (3) that it was an act which would have occurred to any person of competent skill and experience, placed in the situation in which the party stood (b).

In another passage of the Digest, the Roman jurist has to solve a question which, at the present day, is still felt to be one of difficulty, the defence, namely, of inevitable accident. A common operation then as now was the burning of heath and brushwood,—an operation not unlawful if done with due precautions against the fire spreading, but always attended with a certain risk. Therefore if he did it on a windy day, he was guilty of fault, for he might have known that the fire would spread, and he who brings about a state of things from

(a) 3 Bing, N. C. 468.

(b) *Imman v. Reck*, L. R. 2 P. C. 25, 34.

which damage arises, is considered to have done the damage (*a*). But if he has selected a suitable day, and duly observed the customary precautions, and a sudden gust of wind has carried the flames on to his neighbour's land, he is free from fault (*b*).

Damnum Fatale.—In Scotland an accident is called a *damnum fatale* (*c*), in England an act of God; but both expressions mean the same thing, an act of nature as opposed to an act of man,—an occurrence due to natural causes directly and exclusively, without human intervention. This, however, cannot be said when any fault is imputable to the defender, which might, by possibility, have contributed to the loss. A ship perishes in a storm; the owner is exempt from responsibility, but not if she was unseaworthy, or insufficiently equipped, for no one can say that a seaworthy or well equipped ship might not have weathered it; nor if the master has been guilty of deviation and delay, for then he might have escaped it; nor if he put to sea when the storm was evidently coming on, for then he rashly encountered it. There are occurrences of a phenomenal kind, like an earthquake or waterspout, quite outside the range of ordinary experience, and against which there is no obligation to provide; and even as regards other events, not indeed wholly unprecedented, but of rare and exceptional occurrence,—a violent tempest, or a remarkably high tide,—a man may well be excused for making no adequate provision, or indeed no provision at all. The attempt has been frequently made to treat an extraordinary fall of rain as a

(*a*) "Nam et qui occasionem præstat damnum fecisse videtur." L. Aq. 30. 3.

(*b*) Grueber's L. Aq. 126. And so held in *M'Intosh v. M'Intosh*, 2 M. 1357; *secus Keith v. Keir*, 1812, F. C. (The report is inaccurate, in so far as it states operation done against orders.)

(*c*) The expression first occurs in the Digest in a passage explanatory of the edict *Nautæ cauponæ stabularii*,

holding carriers and innkeepers accountable for the loss of goods, without proof of fault. The fact of the loss raised a presumption against the carrier (or innkeeper); but when the latter was able to prove "*si quid damno fatali contingit*," like shipwreck, an attack of pirates, etc., he was exonerated, provided he was wholly free from blame. Dig. 4. tit. 9.

damnum fatale; but in a wet, variable climate such as ours it has never been so regarded; and the builder of a structure which the flood has carried away, has been uniformly told that a party who makes a new work is bound to protect those on a lower level from such events, extraordinary as well as ordinary. To be a *damnum fatale* the event need not be *unique(a)*; it is not necessary that it should never have occurred before, but it should be so unlikely to occur that it could not have been reasonably anticipated (*b*).

By inevitable accident is not meant a casualty which must have happened in any case, for the party whose act has led to the damage was not bound to act at all. We mean an accident occurring during the performance of an act lawful in itself, and done in a reasonably safe and careful manner. And in such an event our law holds, in accordance with the ruling of the Roman jurist which has just been cited, that there is no liability.

A leading case on this point is *King v. Pollock (c)*. A blacksmith got back his gun (a muzzle-loader) from a bothy where he had left it unloaded some time before. He lifted the dog-head and saw there was no percussion-cap on the nipple, and tried to pull out the ramrod to test whether it was loaded or not, but from rust or other cause he failed. He then laid it aside in a press in the smithy used for keeping files. In the afternoon, while the blacksmith was called temporarily out to speak to a man at the door, a boy who had been blowing the bellows espied the gun, took it out of the press, and when handling it the gun went off and injured a person in the blacksmith's employment severely. The Sheriff having found the blacksmith liable in damages, he appealed to the Court of Session, who, waiving the question whether it would have

(a) Per Lord Ardmillan in *Potter v. Hamilton and Strathaven Ry.*, 3 M. 83, 86; *Kerr v. Earl of Orkney*, 20 D. 298; *Tennent v. Earl of Glasgow*, 2 M. (H. L.) 22; *Pirie v. Mags. of Aberdeen*, 9 M. 412; *Roths v. Kirkaldy Water Works Comrs.*, 6 R. 974.
 (b) *Nitro-Phosphate and Adam's Chemical Manure Coy. v. London and St. Katharine Docks Coy.*, L. R. 9 Ch. Div. 503; *Nichols v. Marsland*, L. R. 2 Ex. D. 1.
 (c) 2 R. 42.

been negligence to have left a loaded gun in the press, in the knowledge that it was loaded, although the cap was off, decided that the blacksmith had reasonable grounds for thinking that it was not charged, and there was no such fault on his part of a tangible and intelligible description leading to the accident as to render him liable. He was entitled to keep firearms; he was not bound to insure persons coming into his smithy against accidents; and he had acted as a man of careful and conscientious mind would have acted if his own family were concerned.

The case of *Galloway v. King* (a) arose out of an accident from a can of nitro-glycerine. The contents having been poured out, the can was laid aside in an old hut in the belief that it had been completely emptied; but a quantity remained in a solid state in the can, and some boys having climbed the wall and gained access to the hut, one of them struck the can with a hammer and caused an explosion. In these circumstances (apart from the question of the trespass), the Court found that there was no reasonable ground for attributing fault to the defender, or any one in his employment, for not knowing or suspecting that there was any portion of the substance in the can, and that it might cause an explosion. The workmen were reasonably entitled to believe that they had got rid of the whole of it; and, considering their state of knowledge respecting the substance, there was no negligence.

The same question came before the Supreme Court of the United States in a case in which the accident also arose from nitro-glycerine (b). In 1866, before the nature of this substance was so well understood, a firm of carriers received a wooden case in New York for conveyance to San Francisco. When it arrived there, the contents, which had the "appearance of sweet oil," were leaking, and, according to the ordinary course of business, it was taken to the defendant's offices to be examined. While a servant was engaged in opening the box

(a) 10 M. 788.

(*The Nitro-Glycerine Case*), Dec.

(b) *Parrot v. Wells, Fargo, & Co.* 1872, 15 Wall 524.

with a mallet and chisel, the contents—being in fact nitro-glycerine—exploded. Every one present was killed, the neighbouring buildings were more or less damaged, and much valuable property destroyed. The action was brought by the proprietor for the injury done to the buildings. It was found in fact that none of the persons concerned in the handling of the case had any knowledge, or the means of knowledge, of the dangerous character of its contents, and it was dealt with in precisely the same way as men of prudence employed in the same trade would have treated a case, presenting the same appearances, in the ordinary course of business. It was held by both the Circuit Court and the Supreme Court of the United States, that the defendants were not liable. They were not, it was considered, bound to know, in the absence of reasonable grounds of suspicion, the contents of the package offered them for carriage, and without such knowledge in fact, and without negligence, they were not liable for the accident. “No one,” said the Court, “is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business. . . . The measure of care against accident which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own.”

In the course of the judgment, reference was made to another American case decided by the Supreme Court of Massachusetts, and cited with approval. The defendant, while trying to part two dogs fighting, plaintiff looking on, retreated backwards, striking them with his stick. With his back to the plaintiff, he raised his stick over his shoulder and hit plaintiff in the eye, inflicting on him a severe injury. The action was trespass for assault and battery. It was held that the act in which the defendant was engaged was a lawful and proper act, which he might do by proper and safe means; and if in doing this, using due precaution, he accidentally hit plaintiff in the eye, it was pure accident, and the action would not lie. The decision in effect affirms

the proposition: "If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom" (a).

The case of horses bolting and running away has always been treated, both in England and Scotland, as a simple accident. *Shaw v. Croall & Sons* (b) is a recent instance. A cabman drew up at a railway station in the line of cabs, descended from his box, and proceeded to give his horse a feed of corn. He then turned away to put back the bag of oats in its place, and when his back was turned the horse, which had the reputation of a quiet beast, suddenly ran off. It was held that there was no *culpa* on the part of the driver, sufficient to infer responsibility on him or his employer, for damage done by the horse in its flight. The result arrived at by the Court agrees with the decision of the Court of Exchequer in *Holmes v. Mather* (c), a case in which a pair of horses ran away with the groom when he was out exercising them. Being unable to stop them, he guided them as best he could, but failing to clear a corner, they ran over the plaintiff. The jury found no negligence, and the Court said that for the convenience of mankind people must put up with such mischief as reasonable care on the part of others cannot avoid. Accidents also sometimes happen from the practice of driving bulls along the public streets. It is not a perfectly safe practice, but it is not unlawful (unless when prohibited by an order of the magistrates), and in many towns, where there is a traffic in cattle between the railway and the steamer, it is unavoidable. But it has been held, that if the animal is properly ringed and roped, and is being carefully driven, the fact that it breaks away and injures one of the public, gives no cause of action (d).

Proof of Negligence.—In the trial of a question of negligence the Court or jury has to be satisfied on two points,—

(a) *Brown v. Kendall*, 6 Cush. 295.

(b) 12 R. 1186.

(c) L. R. 10 Ex. 261.

(d) *Harpers v. Gt. North. Ry.*, 13 R. 1139; *Phillips v. Nicol*, 11 R. 592.

that there was negligence in fact, and that it was the cause of the accident. The defender is entitled to know what was the fault alleged, and how it contributed to the injury, for the negligence which does no harm to any one is no cause of action. If, on the case presented, the cause of the accident is left unexplained, or if the explanation given is consistent with different causes,—some of which imply blame and others not,—the pursuer has not discharged the burden of proof, which in the first instance rests on him. But in the application of the rule, it is to be remembered that the jury come to the consideration of the question as men of the world, and decide it in the light of everyday experience. The requisite proof may therefore be furnished by the nature of the accident itself. A railway train unaccountably leaves the rails; a barrel of flour falls out of the window of a warehouse, and injures some one walking on the street below. It is not for the injured person, a stranger to the premises, to explain the particular neglect to which the accident is attributable, and the law relieves him of the duty by requiring the defender to account for the occurrence, which, save on the hypothesis of blame, is unaccountable. If he is innocent, the explanation will be easy; but in the absence of explanation, a jury will be justified in holding that such an occurrence could not have happened to persons showing proper care in the management of their business. “When a man,” says Lord Fullerton, “is ordered by his employer to mount a ladder, and before he has got half-way up, the ladder goes to pieces; or when half-a-dozen of men are put upon a scaffold, and the unavoidable consequence is the fall of the scaffold, what is the fair and natural conclusion, but that the one and the other were defective? To say that in such a case the sufferers, in order to make out the responsibility of their employers, are bound to prove the specific defect which occasioned the failure, would be, in many cases, an absolute denial of justice. How is a pursuer to prove this?” (a). *Res ipsa loquitur*. The pursuer discharges the *onus probandi*

(a) *Macaulay v. Buist*, 9 D. 245, 248.

by general evidence inferring blame; and it is then for the defender to negative the inference. In this manner the burden of proof constantly shifts. In a collision case, the pursuer proves an infringement of a rule of navigation by the vessel proceeded against. The defender replies that his vessel was in "stays," and so helpless. The pursuer retorts that she was improperly put in stays. Each has to make out the affirmative of the proposition; or rather, in considering the whole case after the proof on both sides is closed, the jury are instructed on which of the parties the burden of proving each particular point lay, and decide accordingly. So, if a rope breaks, it will be assumed that there was a breach of duty on the part of the defender, who was under obligation to provide a sufficient rope. He may, however, excuse himself by showing that the fault was latent, and the pursuer can then only succeed by showing that there was still negligence on the defender's part in not periodically examining the rope (a).

Duty of Judge at Trial. — Contributory Negligence. — In general, it is for the jury who are the judges of the facts to decide the question of negligence; but there are at least two cases in which it is the duty of the judge to withdraw it from their consideration—1st, When the facts, if taken to be all true, are insufficient to warrant the inference that the defender was to blame; 2nd, When, on the pursuer's own showing, he was himself guilty of negligence, which directly contributed to the injury. In either case the judge is entitled to interfere, because, waiving the controversy as to the facts, the trial can only end in one way—the pursuer can take nothing by his action. This important doctrine of contributory negligence rests on a principle which has been thus stated by Lord President Inglis: "Where an event is brought about directly by the *culpa* of two persons, whether joint or several, where the *culpa* of each has contributed to produce the event, and the event would not have been produced but for the *culpa*

(a) *Fraser v. Fraser*, 9 R. 896. See also *Walker v. Olsen*, 9 R. 946.

of both, there can be no claim as between these persons for reparation of injury flowing from that event" (a).

Contributory negligence always assumes that the defender has been guilty of negligence. It puts the question, Granting that there was fault on the part of the defender, could the pursuer, by the exercise of ordinary care, have avoided the injury? It is a plea in defence of the nature of confession and avoidance, and is frequently stated in circumstances to which it is wholly inapplicable. The man who fettered his ass on the highway, which was afterwards run down by a passing waggon, was guilty of negligence, but not contributory negligence, and the only question in the case was whether the driver of the waggon or the man himself was to blame for the accident; and it was held it was the former (b). But when an engine-driver (contrary to the rules of the company) fails to whistle when he is approaching a station at express speed, and a passenger recklessly tries to cross the line in front of the advancing train and is killed, we have a proper case of contributory negligence. There is fault on the part of the company, but fault which would have led to no injury but for the man's own recklessness, and his representatives are not entitled to damages (c).

The Damage Recoverable.—Theoretically a claim of damages represents the difference between a man's present pecuniary position and what his position would have been but for the defender's act. It is well expressed by the Roman word *Interesse* (d), and involves a comparison between two terms

(a) *M'Naughton v. Cal. Ry. Co.*, 21 D. 160, 163.

(b) *Davies v. Mann*, 10 M. & W. 546.

(c) *Dublin, Wicklow, and Wexford Ry. Co. v. Slattery*, L. R. 3 App. Ca. 1155.

(d) A few passages may here be cited from the Roman law in illustration of this point (taken from Heumann's *Handlexicon*, voce *Interesse*).

The damages recoverable, comprehended both loss sustained and profit ungained (D. 19. 2, l. 33)—
 "Si colonus tuus fundi frui a te prohibeatur—tantum ei prestabis, quanti ejus interfuerit frui in quo etiam lucrum ejus continebitur," l. 1, § 41, D. 43. 16. "In hoc interdicto (sc. de vi) omnia quæcunque habiturus vel assecuturus erat is, qui dejectus est, si vi dejectus non esset, restitui aut

fixed or ascertainable, his worth before the illegal act of which the pursuer complains, and his worth now. The difference is his actual loss (*damnum emergens*); but, to make the calculation complete, a third item has to be taken into account, how much richer would he have been if the act had not occurred? If the profit prevented (*lucrum cessans*) can be ascertained by proper and satisfactory evidence, it has to be added to the other loss, and the two together form the true measure of damages (a). The law, however, disregards all speculative and hypothetical sources of profit which might or might not have been realized, and damage of this sort is disallowed on the ground of remoteness, according to the maxim, *causa proxima non remota spectatur*. No man is liable *ex delicto* except on proof that his act was the immediate cause of the injury; nor for any damage which was not its direct and necessary result. A wrong-doer is liable for all the detriment of which his act was the proximate cause, whether it could have been anticipated or not; but the two together must be so related that the one flowed out of the other, naturally and in the ordinary course of things, as an effect follows its cause. If, however, there be a train of causes,

eorum litem a iudice aestimari debere, eumque tantum consecuturum, quanti sua interesset se vi dejectum non esse," l. 13, pr. D. 46. 8. "Si commissa est stipulatio—in tantum competit in quantum mea interfuit, id est quantum mihi abest quantumque lucrari potui," l. un C. 9. 47. "Hoc non solum in damno sed etiam in lucro nostra amplectitur constitutio quia et ex eo veteres id quod interest statuerunt," cf. l. 3, pr. D. 2. 10; l. 4, § 1, D. 10. 1; l. 3, D. 13. 1. "Si condicatur servus ex causa furtiva, id venire in conditionem certum est, quod intersit agentis, veluti si heres sit institutus, et periculum subeat dominus hereditatis perdendæ," l. 8. D. 21. 2. The word is sometimes used in the sense of *utilitas*—as opposed to a thing's worth—rei

aestimatio or pretium, l. 14, D. 2. 11; l. 1, § 5, D. 43. 4; l. 4, D. 12. 3; l. 1, § 20, D. 27. 3; l. 50, pr. D. 47. 2; l. 193, D. 50. 16; l. 12, C. 4. 49, cf. l. 1, pr. D. 19. 1. "Si res vendita non tradatur, in id, quod interest agitur hoc est quod rem habere interest emptoris; hoc autem interdum pretium egreditur, si pluris interest, quam res valet, vel emta est." The subject of the measure of damages according to the Roman law is learnedly discussed in Cohnfeldt's *Die Lehre vom Interesse nach Römischen Recht*, Leipzig 1865; Mommsen's (Friedrich) *Beiträge zum Obligationen Recht*, Abth. ii.; *Zur Lehre von dem Interesse*, Braunschweig 1855.

(a) *Yale Lock Co. v. Sargent*, 117 U. S. 536.

the *causa proxima* is that which sets the train in motion, and the intermediate steps between it and the final result are not considered. Since the celebrated squib case this rule has been well settled. Shepherd threw a lighted squib into a building full of people, and it was thrown from one person to another until in its third flight it struck Scott in the face, exploded, and destroyed the sight of an eye. There was no doubt of the negligence of Shepherd, because, although he acted from no malice to Scott or anybody in particular, his motive was mischief. It was equally clear that the persons who tossed it from one to the other during its flight acted from self-preservation, and were not responsible. The Court held, therefore, that Shepherd, who had set the thing in motion, must answer for all the consequences until it again came to a stand (*a*). In the complications of actual life the principle is often difficult of application; but from the cases which have occurred the following rules may be deduced:—

1. A wrong-doer is not entitled to throw the blame on the pursuer by showing that if, at an earlier stage, he had taken a course different from the one taken, a different situation would have resulted. As already observed, such an omission is not contributory negligence, if there was negligence on the part of the defender. The negligence, which is over before the defender's negligence begins, will not relieve the defender from the consequences of his own negligence (*b*).

2. Nor is he allowed to say that, even if there had been no failure on his part, the result would have been practically the same (*c*). A law agent fails to instruct a messenger to execute a caption; the messenger fails to apprehend the debtor; or the magistrate fails to receive him into prison, or allows him to escape,—in all such cases it is impossible to tell what might have been the effect of the imprisonment,—the debtor might have had the money, or a friend might have found it for him,—and it was irrelevant to urge that nothing

(*a*) *Scott v. Shepherd*, 1 Sm. L. C. (9th ed.) 480.

(*b*) *Spaight v. Tedcastle*, L. R. 6 App. Ca. 217.

(*c*) *Stiven v. Watson*, 1 R. 412.

could have been extracted from the debtor in the shape of payment, and the diligence, although executed, would have been useless. If, however, there was no debt, or owing to a nullity in the foundation of the diligence no enforceable debt, a different case was presented, for in that event the creditor would have suffered no damage (*a*). Again, where the damage sued for has been caused by the neglect of proper precautions, the party in fault cannot be heard to say that even with proper precautions the same damage would have resulted. If a public body is bound by statute in embanking a river to raise a wall 4 feet high, and erects instead a wall about 3 feet 6 inches, in consequence of which the neighbouring land is submerged by a high tide, it is no answer to the liability for the breach of statutory duty, that as the tide rose actually 4 feet 5 inches, the same damage would have resulted. No one can tell; in any case the rise would be gradual, and some of the damage must have been done under 4 feet; and a wrong-doer, it was decided, could not escape from the liability thus incurred by proving that the tide went on swelling. The defenders, however, were allowed an opportunity of showing that the damage due to their neglect and the damage due to the excessive tide might be apportioned (*b*).

3. There are many cases also which go to prove that a person who has been guilty of negligence is liable for all the consequences, even when these are mainly, if not wholly, attributable to natural causes. When a ship, reduced to a disabled state through the fault of another, is left at the mercy of the wind and waves, the original wrong-doer is liable for her being driven ashore, for the presumption is that, but for her being disabled, she would have weathered the gale (*c*); and on the same principle, no wrong-doer is entitled to throw the blame of the accident on some third party, on the ground that but for his intervention no harm would have

(*a*) Lord Deas, *Davidson v. Mackenzie*, 19 D. 226, 254.

(*b*) *Nitro-Phosphate and Odam's Chem. Manure Co. v. London and St. Katharine's Docks Co.*, 9 Ch. Div. 503.

(*c*) *Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Ex. 204, *affd.* L. R. 7 Ex. 247. See also *Sneeshy v. L. & Y. Ry. Co.*, L. R. 9 Q. B. 263, *affd.* L. R. 1 Q. B. D. 42.

followed (a). If both have rendered themselves liable, the pursuer is entitled to proceed against either; but it may be that the first only will be left to bear the responsibility. An instance of this occurred in the case in which the negligence consisted in allowing an escape of water in the highway which caused a pair of horses to start to the one side, and, owing to a defect in the fence, to upset the plaintiff's carriage into a ditch (b). The proximate cause of the damage was held to be, not the want of a fence, but the water escape. It was held to be enough to show that it was the *causa causans*. A house-van attached to a steam-plough, which had been left improperly on the highway, caused a horse to shy and run off, and kill the driver. It was proved that the horse was a kicker, though the driver was not aware of the fact; but it was held that this did not disentitle the representatives of the deceased from recovering, for before the defender committed his wrongful act he should have remembered that it was always possible that nervous, timid horses would come along the road, and it was their liability to be frightened that caused the danger (c). And generally it may be laid down that the fact that a second cause in point of time has concurred to produce the injury does not make the main or primary cause too remote. A leaky gas-pipe is furnished by a gas company in breach of their contract. The gas escaping, a gasfitter is employed to find out the cause, and negligently goes into the room where the gas had accumulated with a lighted candle, causing an explosion and injury to the premises. The company being sued, threw the blame on the gasfitter as the proximate cause; but the Court held that the company having been guilty of negligence, the subsequent negligence of a third party did not exonerate them (d).

(a) 14 R. 237.

(b) *Hill v. New River Co.*, 9 B. & S. 303. See *Sneesby v. L. & Y. Ry.*, *sup.*

(c) *Harris v. Mobbs*, L. R. 3 Ex. D. 268; *Vandenburgh v. Truax*, 4 Denio R. (Amer.) 464; defender quarrelled with a boy in the street, picked up

an axe and chased him into a store; the boy in his anxiety to escape ran against a cask of wine and knocked out the spigot. Defender liable for loss of the wine.

(d) *Burrows v. Marsh Gas Co., L.* R. 5 Ex. 67, *affd.* L. R. 7 Ex. 96.

CHAPTER II.

DELICT AND CONTRACT.

Right of Action—when?—The general rule is, that where a right is infringed damage is presumed; and a verdict for a nominal sum is returned against the wrong-doer, without proof that any harm has been the result, as a finding that he has acted unjustly in invading another's right. The man who has without leave walked across another's field is liable in damages, although the field is not a farthing the worse; and the like holds in cases of an assault on the person, an attack on the reputation, and the wrongful detention of movables,—these are all acts injurious in themselves, and no further proof is necessary. But in other cases, such as negligence, fraud, and operations *in suo*, the absence of damage destroys the right of action,—for these are all acts which are not necessarily injurious,—and if no harm follows no ground of complaint will ever arise. No one, therefore, is entitled to recover for acts of that description unless he can prove that, as a consequence, he has to an appreciable extent suffered in person or estate. When the grievance is done to a member of the community at large, the wrong-doer is not entitled to plead that because many others have been injured just as much as the pursuer, he (the defender) is under no liability except such as has been imposed by the statute relating to his operations. An obstruction to the public street may cause inconvenience to the general public in a marked degree, and to particular individuals—such as those who have premises on the street—in a still greater degree; but every person whose passage is obstructed is entitled to be indemnified if, in fact, the obstruction is illegal, and that whether

or not the offender has been mulcted in the penalties which the statute prohibiting the act, attached to disobedience. The reason is that a common law remedy previously existing is never held to be excluded, except when this is distinctly declared (*a*).

All Liable in Solidum and no Contribution.—By the Roman law, when a slave was killed in an affray in which more than one person was concerned, the assailants were all equally liable whether they acted in common or as accomplices (*b*); and in modern law the rule is the same. The distinction between principals and accessories of the criminal law, and principal and agent of the civil law, is not recognised. Their liability is joint and several for all the damage which was done (*c*). But having brought his action and obtained judgment against one of several wrong-doers, the pursuer cannot sue the others in a second action. Nor on his part has the defender, who has been cast in damages, any right to contribution from the others (*d*) unless the act is not clearly illegal, and he is able to prove that from no negligence, but in the honest belief that he was justified in doing what he had been asked to do, he acted innocently. On this principle, when a wrong is committed by a master and servant, or, indeed, by any person at the request of another, while both are liable to the injured person, the employé may have relief against the employer for leading him to believe that the order, to which he had given obedience, was within his powers. Such a case is not *par delictum* unless the order was obviously illegal (*e*).

Recovery once for all.—The principle is likewise well established, that damages resulting from one and the same cause of action, must be recovered at one and the same

(*a*) *Clyde v. City District Ry. Co.*, in *Ferguson v. Kinnoul*, 1 Bell's App. 12 R. 1315.

662, 696.

(*b*) Dig. de L. Aq. 11. § 2, 4.

(*d*) St. 1. 9. 5; Ersk. 3. 1. 15.

(*c*) Per Lord Chan. (Lyndhurst)

(*e*) *Betts v. Gibbins*, 2 A. & E. 57; *Evans v. Collins*, 5 Q. B. 804.

time. When a man sues on the ground of personal injury, he sues for all his damage, past, present, and future, certain or contingent(*a*). He cannot maintain an action for a broken arm, and subsequently for a rib not known at the time to be broken also. The assessment includes not only the actual damage which has already accrued, but the possible prospective damage which may yet accrue, the intention being that the pursuer, by the verdict which he may obtain, shall be in as good a position as he would have occupied, if the injury of which he complains had never occurred. Having received that compensation, he has therefore no right of action for any damage which he may subsequently suffer from the same cause. For the same reason, if the person injured has accepted a sum of money by way of indemnity, he is barred from maintaining any further action in respect of it (*b*). The words "cause of action" are, however, used ambiguously. An unabated nuisance is held to be a continuous cause of action; and when the surface falls in from underground workings, each successive subsidence may be the subject of a separate claim (*c*).

Interest is included in the damages; and does not run *ex lege* on the sum awarded by the jury prior to the date of the judgment (*d*).

It has also been decided that two different defenders cannot be sued in one action for two different wrongs. If it be the same cause of action they may be sued jointly; but it is not competent to unite in the same summons two independent acts occurring on two different occasions, and

(*a*) *Stevenson v. Pontijer*, 15 R. in respect of the damage to his property, per Lord Bramwell, 144; 125.

(*b*) *Wright v. London Omnibus Co.*, L. R. 2 Q. B. D. 271. *Brunsdon v. Humphrey*, L. R. 14 Q. B. D. 141. Lord Coleridge

(*c*) *Darley Main Colliery Co. v. Mitchell*, L. R. 11 App. Ca. 127. It dissented from this judgment "as a subtlety not warranted by law;" and there is no instance of such a distinction being taken in Scotland.

(*d*) *Denholm v. L. & E. Ship. Co.*, 3 Mc. 815; *Flensburg Ship. Co. v. Seligman*, 9 M. 1014.

conclude against the defenders for one sum in name of reparation (*a*).

Having now briefly mentioned these rules of pleading, it becomes necessary to examine more particularly the distinction between a contract and a delict, as a ground of action. The following is a parallel view of the leading rules applicable to each:—

Parallel view of Contract and Delict:—

CONTRACT.

(1.) The person who sues must be the person with whom the contract was made; and if more than one, they all require to join. A. cannot by himself recover damages for breach of contract made between A. and B. on one side and C. on the other.

(2.) The persons who are bound by a contract must be sued jointly; and if one pays the entire sum claimed, he has a right to sue each of the others for contribution.

(3.) By the common law a minor is not (in general) liable, nor is a married woman under a contract. (But see Married Women's Property Act, 1881.)

(4.) A lunatic is not liable *ex contractu*.

(5.) Damage resulting from a breach of contract partially or imperfectly implemented, may be set off as against what is due under the contract.

DELICT.

(1.) Any person injured by a wrongful act has action against the wrong-doer. If several persons have been injured by the same act, they may sue separately or jointly, each of them being entitled to recover for the damage which he has personally sustained.

(2.) When a wrong is done by several persons jointly, each is separately liable for the whole. He is not entitled to say that there were others associated with him in the commission of the wrong. He must answer for the act as if it were his own; and if he pays the whole damage claimed, he has no relief against those who paid nothing.

(3.) A married woman and a minor are liable for their own wrongs, and damages may be recovered from their separate estate.

(4.) *Ex delicto* a lunatic is liable.

(5.) Damage resulting from a wrong independent of contract, cannot be set off against any other claim.

(a) *Taylor v. M'Dougall & Sons*, 12 R. 1304; *Barr v. Neilsons*, 6 M. 651.

Cases where Breach of Duty is also Breach of Contract.—A person may be liable to be sued in respect of conduct, which is both a breach of contract and a breach of some more general obligation; and, in such a case, the remedy is alternative, and damages may be claimed either *ex contractu* or *ex delicto*. A partner who fraudulently appropriates the funds of the partnership is guilty, in one sense, of a breach of contract to the other members of the firm; but, independent of contract, he may be sued for the fraud. So with regard to malversation on the part of the directors of a public company. A violation of the articles of association would be a breach of the contract between them and the company implied in their appointment; but it is a wrong at common law also, for their acceptance of office imposes on them the duty of acting with diligence in the management of the company's affairs, and they are all, jointly and severally, liable to make good the loss which has been the consequence of their misconduct. In Scotland, where no artificial classification of actions has ever existed, and every action is presented to the Court as an action on the case, the distinction between contract and tort, as it is called in England, is of less consequence, except when it is necessary to dispose of the plea that all parties are not called. In an action *ex contractu* this is an effectual bar until it is cured; in a delict, for the reasons already given, it is irrelevant, the complainer having his choice against whom he will proceed (a). "The test of distinction," says Lord President Inglis, "will generally be found in the inquiry, whether the nature of the obligation of reparation as disclosed in the summons, falls to be determined by the terms of the contract, or by the acts and conduct of the defender. If the action is for breach of contract, the contract itself will, by its own terms, fix whether the liability is joint or several, or joint and several" (b).

(a) *Ross v. Baird*, 10 D. 1493; *Leslie's Reps. v. Lumsden*, 14 D. St. 1. 9. 5; *Ersk. 3. 1. 15*, per Lord 213.
 Chan. (Lyndhurst) in *Ferguson v.* (b) *Liquidators of Western Bank Kinnoul*, 1 Bell's App. 662, 696; *v. Douglas*, 22 D. 447, 476.

Banker and Customer.—Certain duties are attached by law to particular occupations, the breach of which will found a claim to damages. An example is the duty which commercial usage has engrafted on the relation of banker and customer, by which the former is bound to honour a customer's cheque if he has funds in his hands to meet it. The relation between banker and customer is not fiduciary. It is not that of principal and agent; the banker is in no sense a trustee. The customer when he pays in his money makes a loan to the banker, and when it is paid in it becomes the banker's money, to be used as he thinks best. The relation is simply that of debtor and creditor; depending on the state of the account which is debtor and which is creditor, and determinable at pleasure (*a*). Yet a banker is not entitled to refuse payment of a cheque if he has the means in hand of doing so, because such an act may be particularly injurious to a man's credit; and the law has superadded to the duties incumbent on the banker as his customer's debtor a separate and independent obligation from his professing to be a banker, that he shall pay the customer's cheques whenever he shall have money in his hands, or within a reasonable time after receiving such money. And although no evidence is given of special damage, the jury may give reasonable compensation for the injury he has sustained by the dishonour of his cheque (*b*).

Professional Negligence—Solicitor and Client.—We see the same principle in operation when the common law exacts a certain standard of proficiency as the condition of practising law and medicine, and, in fact, any profession requiring special training, experience, and skill. Ignorance of what to do, or neglect in the doing of it, is actionable on the double ground that it is both a breach of contract, and a breach of public duty, and so founding a claim to indemnity *ex contractu* or *ex delicto*. *Spondet peritium artis*. The public profession of

(*a*) *Foley v. Hill*, 2 H. L. C. 28; (*b*) *Marzetti v. Williams*, 1 B. & Ex parte Waring, 36 L. J. Ch. Ad. 415; *Rolin v. Steward*, 14 C. B. 151. 595.

an art is an undertaking to all the world that the practitioner is reasonably well qualified for its exercise, and that he possesses that particular skill and knowledge which we expect in a surgeon or man of business. The points which arise are: did the defender accept the employment; did he culpably neglect it; and was this neglect the cause of the loss and damage claimed? Although we shall draw our illustrations almost exclusively from actions which have been raised by clients against their legal advisers, the principles equally affect all classes of professional men.

In giving Advice. A solicitor consulted by a client does not guarantee that the opinion which he may give, either on a point of law or as regards the proper mode of procedure, shall turn out correct. He is only bound to advise him to the best of his judgment; and if he do go astray, the fact does not infer negligence, unless the advice tendered, or the course followed, was so grossly erroneous, as to be altogether inexcusable in any ordinary well-informed member of the profession (*a*). Short of this, however, he is not responsible for mistakes. In particular, if he follows the usual practice he is excused; and if the point was novel and difficult, on which practice gave no light, he is equally exempt from responsibility (*b*). Thus, damages having been awarded to a person living in Berwick-on-Tweed for being apprehended on a Border warrant,—a species of writ afterwards found to be illegal,—it was found that the creditor had no recourse against the solicitor by whom the proceedings had been ordered and prepared, seeing that he had done nothing more than follow the beaten track of the profession on the subject; and though his law had

(*a*) Per *Ld. Deas* in *Hamilton v. Enslie*, 7 M. 173, 176; per *Ld. Fullerton* in *Cooke v. Falconer's Reps.*, 13 D. 157, 172; *Grahame v. Alison*, 9 S. 130, *affd.* 6 W. & S. 518; *McLean v. Grant*, 15th Nov. 1805, F. C. M. App. Rep. 2.

(*b*) In *Hamilton v. Enslie*, *sup.*, a pointing was set aside where goods valued at £72 were taken in execu-

tion for a debt of only £13. *Ld. Kinloch* dissented, but the rest of the Court thought that, considering a margin had to be left for the landlord's claims, the illegality was not clear enough (until it was decided) to render the defender liable in damages to his client.

been bad, this was not fairly imputable either to gross neglect or gross ignorance of the ordinary professional rules (a).

But though an agent is not liable who is constrained to grapple with a nice and difficult point of law or practice, the case is different when it appears that he had a safe and plain course before him; and, instead of adhering to the ordinary practice, deserts it in order to embark on some new and doubtful method of his own devising. If he raises unnecessarily a nice and difficult question, he must take the chance of his being wrong. An agent employed to prepare a security over a land estate, having, in place of the usual obligation to infest *a me vel de me*, inserted an obligation *de me* only, and neglected to get it and the sasine confirmed, whereby the security became unavailing, the client was held entitled to recover (b).

In Contentious Business. A solicitor is expected to know the practice of his own Court, and when employed to take proceedings under a statute, to take care to libel on the right section (c). When a mistake of this kind is committed, the client is responsible to the opposite party in the first instance, because the proceedings are in his name, and the agent acts as with his authority in all matters relating to the conduct of the suit. If, for instance, during the litigation the agent wrongfully issues a process caption, both agent and client will be answerable in damages; but the client has relief against the agent (d). He is also bound to see that all the proceedings are in form, even those for which the Court and its clerk are responsible. A conviction under 4 Geo. IV. c. 34 was set aside, on the ground that the declaration of the servant on which it bore to have proceeded was not authenticated by the signature of the justices. The servant having obtained

(a) *Purves v. Landell*, 4 Bell's App. 46, reversing 4 D. 1300. an apprentice under the 4 Geo. IV. c. 34, proceeded under the wrong

(b) *Rowand v. Stevenson*, 5 S. 838, affd. 4 W. & S. 177. section of the statute as against a servant.

(c) *Hart v. Frame*, 6 Cl. & F. 193, M.L. & Rob. 595; *Frame v. Campbell*, 14 S. 914. In these cases (d) *Pearson v. Anderson*, 11 S. 1008; *Stewart*, M. 13,989; *Anderson*, M. 13,949.

a writer retained to proceed against

damages from his master, the latter raised an action against his agents, who defended themselves on the ground that they were not bound to correct the errors of the justices or their clerks. The Court, however, were of a contrary opinion, and held that in a Justice of Peace Court it was the duty of the prosecutor's agents to see to the regularity and due authentication of the proceedings (*a*).

In the execution of diligence the client is answerable to a third party both for the agent and messenger's mistakes; but agent and messenger are not answerable for each other. To the client the agent fulfils his duty by selecting a good officer and putting into his hands a good warrant, and revising the execution on its return. He is not answerable for apprehending the wrong man, nor letting the right man escape after apprehension (*b*), for these acts are the fault of the messenger; nor for a blunder which (unknown to the agent) is the fault of the client himself, as when the debt charged for is in excess of the sum truly due (*c*). On the other hand, the agent is to blame if he issues execution on an incompetent decree, or poinds a bankrupt's effects after he had obtained his discharge, or does diligence on a six instead of a fifteen days' charge, or after he had agreed to a stay of diligence (*d*).

Non-contentious Business. When a solicitor is employed to invest money by way of loan or purchase, it is his duty to investigate the title and see that it is unencumbered. An agent who omits to obtain the requisite searches, is personally liable to his constituent for loss arising through a preferable security, which a search would have disclosed (*e*).

An agent is often required to advise his client as to the

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| (<i>a</i>) <i>Smith v. Grant & Leslie</i> , 20 D. 1077; see also <i>Hamilton v. Fraser</i> , 14 Feb. 1817, F. C.; <i>Brown v. Forsyth</i> , Hume 318; <i>Russell v. Hedderwick</i> , 21 D. 1325; <i>Brown v. Wemyss & Walker</i> , 7 S. 626; <i>Stanners</i> , M. 13,131; <i>Sibbald</i> , M. 13,139. As to this case, see Lord Balgray's remarks in <i>Brown v. Wemyss & Walker</i> , <i>sup.</i> 627. | (<i>b</i>) <i>Russell v. Hedderwick</i> , 21 D. 1325. |
| | (<i>c</i>) <i>Henderson v. Rollo and Others</i> , 10 M. 104. |
| | (<i>d</i>) <i>Gordon's Exrs. v. Dunlop</i> , 3 Mur. 515; <i>Dunlop v. Buchanan</i> , 5 Mur. 16; <i>Smith v. Taylor</i> , 10 R. 291. |
| | (<i>e</i>) <i>Graham, etc., v. Hunter's Trs.</i> , 9 S. 543; <i>Campbell v. Clason</i> , 1 D. 270. |

sufficiency of the security, and when the investment proves unfortunate the blame is sometimes thrown on the agent without much reason. There are only two cases in which the Court has dealt with the question how far a law agent who takes a security, which though valid, proves insufficient, is answerable for the deficiency. In *Ronaldson, etc. v. Drummond & Reid* (a), the agents were held responsible for the sum advanced by the lenders; but these were a body of trustees of whom the law agent was one; no valuation of the property had been obtained; and the house being in the personal occupation of the borrower, no rental could be furnished as an index of the value. All these circumstances (and some others) were founded on by the Court as a reason for finding the defenders liable, and the decision is therefore practically valueless as a precedent. In the other case (b) a sum of money had been advanced on a patent, which proved to be useless from anticipation. It was said that the agents should have found that out; but the Court decided that so long as they fulfilled their duty as conveyancers by seeing that the letters patent were *ex facie* regular and the assignation valid, they were under no obligation to engage in inquiries which properly belonged to a patent agent, unless they had expressly undertaken to do so. We do not, however, mean to say that a conveyancer entrusted with the investment of money is under no duty to his client with respect to the security. Although the business of valuing property is outside his proper professional duty, a solicitor becomes by experience a very competent adviser as to the prudence of a particular transaction; he knows probably what was given for the next property, and has perhaps lent money on some others not very distant, and naturally he acquaints his clients with these facts (c). From this a practice has sprung up of con-

(a) 8 R. 767.

(c) *Stirling v. Mackenzie, Gardner, & Alexander*, 14 R. 170; *Raes*(b) *Stewart v. M'Clure, Naismith, Brodie, & Macfarlane, etc.*, 13 R. 1062; reversed, House of Lords, 15

R. (H. L.) on another point.

veyancers both seeing to the sufficiency of the title and the sufficiency of the security; and in the latest case on the point the Court distinctly rejected the plea, that a conveyancer outside matters of conveyancing owes no duty to his client. "I cannot," said Lord Rutherford Clark, "adopt this view. I think, on the contrary, that the defenders were bound to take all reasonable care in seeing to the sufficiency of the security which they recommended to their client" (a). The care, however, of which the learned judge speaks, is the care incumbent on him *qua* solicitor; and when a solicitor advises a client as to the money value of a security, he does not advise him as a solicitor at all; he converts himself for the time into an estate valuer. Generally, therefore, his duty is fulfilled by obtaining reports from a competent and trustworthy valuator, and submitting them to the judgment of the lender, who should decide for himself how far the proposed loan will be a prudent transaction (b). This assumes that he is acting for the lender alone. When he has to lend one client's money to another client, and acts for borrower as well as lender, his position becomes one of great delicacy. If the security afterwards prove insufficient, the question which the Court has to decide is whether in his anxiety to promote the interests of the borrowing client he adequately fulfilled his duty to the lending one, and the *onus* is thrown on him to show that he did everything which as a prudent agent he would have done had he been acting for the lender alone. A man with different clients, some with money to lend, others wanting to borrow it, cannot fairly represent the conflicting interests except at his own risk. And if during the negotiations he becomes aware that there was room for doubt on the subject, it is his duty to communicate these doubts, otherwise he shall be liable in the loss (c). So also,

(a) *Stirling v. Mackenzie, Gardner, & Alexander, sup.*, 179; *Oastler v. Dill, Smillie, & Wilson, etc.*, 14 R. 12.

(b) See Turner's Duties of Solicitors to Clients (Mortgages), p. 219;

Chapman v. Chapman, 9 Eq. 276. For an exhaustive discussion of the liabilities of law agents I refer to Begg, p. 243 et seq.

(c) *Steuart v. McClure, Naismith, Brodie, & Macfarlane, etc.*, 13 R.

if the money is lost by being laid out in a way which was not authorized by the client, the solicitor is bound to replace it.

Liabie only to his Employer. It has been decided by the House of Lords that neither in England nor in Scotland is a law agent responsible for neglect to any one but his employer. A party obtained a loan on the security of two friends, and assigned to them certain subjects in relief of their obligation. The assignation was duly executed; but the debtor's agent, who had been instructed to see it completed, forgot to have it intimated so as to make it effectual against the debtor, and when he subsequently failed the security was lost. The defender pleaded that not having been employed by the cautioners, but by the debtor only, he was under no obligation to them. The Second Division held that if not employed by them, he was at least employed "for their behoof," and, adopting the opinion expressed by Lord Glenlee in *Struthers v. Lang* (a), that the "liability of the agent does not depend on who gives the order, but for whose behoof it was given," they decided that the defender had been guilty of negligence in not protecting the pursuer's interest. But the House of Lords reversed this judgment on the ground that no duty was cast on the defender, except such, if any, as arose by contract, and the case was remitted back to the Court of Session with a declaration that the issue ought to have raised the question whether the defender was employed by, or by the authority of, the pursuers (b).

Nor is a solicitor liable beyond the scope of the duty for which he is employed, as that may be fixed by the practice of the profession. An inhibition against a debtor resident in the Abbey was raised by an agent in Edinburgh, on the employment of an agent in Aberdeen acting under instructions from a foreign creditor. It was published at the Market Cross of Edinburgh, which was a mistake, as the debtor's domicile was at the time in Aberdeenshire, and where,

1062; *Ronaldson, etc., v. Drummond* (b) *Robertson v. Fleming*, 21 D. & Reid, 8 R. 767. 548, 982, 1204, rev. 4 Macq. 167.

(a) 4 S. 418, 419.

accordingly, publication should have been made. The Court held that the town agent was not responsible, seeing he had undertaken merely the duty of doing all that could be done in Edinburgh, but not of that which fell to be done in Aberdeen, and which his correspondent should have himself looked after (*a*). Where, however, it appeared that a writer in the country, after giving instructions to an Edinburgh agent to execute a summons and use inhibition on the dependence, returned no answer to a letter from the latter inquiring if the summons was to be proceeded with, as the inhibition would fall if the summons was not called within the year; and as it was allowed to fall, the Court held the country agent liable, although he had ceased to act for the client several months before the year expired. He should have handed over the Edinburgh agent's letter to his successors when he gave up the agency, or informed his client that no answer had been returned (*b*).

Breach of Confidence. The relation of solicitor and client is one of the strictest confidence. The solicitor's first duty is to preserve all his client's secrets, and not to disclose the contents of papers entrusted to him. He must consider his lips sealed with a sacred silence; and if, when acting for several clients, he finds that their interests require from him duties of a conflicting kind, he should put it in the party's power to secure other advice. But if employed on behalf of two persons jointly, it is his business to see that the one does not take advantage of the other. A. having agreed to sell property to B., both went to one agent, who, on looking over the titles, found it did not belong to A. at all, but to his son, by whom it was sold to B. An action, at the instance of A. against the agent, for improperly disclosing the state of his title, was thrown out; because the agent, having been employed by both parties, could not, with the least regard to his professional honour, have acted otherwise than he did (*c*).

(*a*) *Cooke v. Falconer*, 13 D. 157. see also *Buchanan v. Pearson*, 2 D.

(*b*) *Shortt v. Lascelles*, 6 S. 810. 1177,—a special case.

(*c*) *Bogle v. Cameron*, 6 D. 682;

This obligation of secrecy extends to all classes of professional advisers, medical men included. Thus, a married lady having been delivered of a six months' child, her husband consulted a medical man as to whether the birth was premature. The latter having examined her, reported to the kirk-session, that in his opinion the child was conceived before marriage. This breach of secrecy was held relevant to infer damages (*a*).

Other kinds of Skilled Labour.—The principles which govern the relation of solicitor and client as regards professional responsibility are equally applicable to every description of skilled labour. The employé, although not liable for slight negligence, must always show some degree of skill. Through all fields of labour, from the simple handicraftsman to the highest range of science, the rule is the same. The builder must have some knowledge of building, the plumber (*b*) of plumber's work; and the higher we ascend, the only difference is, that the greater the knowledge required for the safe accomplishment of the operation undertaken, the greater is the amount of skill and care demanded of the employé in its performance.

The English and the Roman law approach the question from different points. The former says that the man who has been trusted to do a thing has by implication promised to do it with adequate care, and so the duty is created; but if he was to get nothing for it, he shall only be liable for gross negligence (*c*). The Roman law, on the other hand, called any undertaking of this kind a *mandatum*,—which from its nature was gratuitous,—for if the service was to be done for reward it fell under a different category, *locatio-conductio*. It was thus immaterial whether the employment was gratuitous or not; for by accepting it, the employé became answerable for due diligence (*d*).

(*a*) *A. B. v. C. D.*, 14 D. 177.

(*b*) *M'Intyre v. Gallacher*, 11 R. 64.

(*c*) *Coggs v. Bernard*, 1 Sm. L. Ca. (9th ed.) 201. But now it is held that negligence, which would

be "ordinary" in an ordinary person, is "gross" in a man of skill. *Smith's Neg.* (2nd ed.) 196.

(*d*) "In exsequendo negotio omnem diligentiam adhibere debet, nec fines mandati excedere: omniaque ex bono

It follows that with us, when a member of the public has been injured through the unskilfulness of a medical or legal practitioner, and brings his action for redress, it is of no consequence whether the contract was gratuitous or not; or whether it had been entered into by a third party for behoof of the person injured; or, indeed, whether there was any contract at all. He should either have done it right or let it alone. A volunteer acting without remuneration is just as much bound to be careful as an agent who charges the usual fees; and after the loss has happened, it will not do for him to say that he acted as a friend and not as an agent. Every professional person employed to do a piece of work is entitled to make a proper charge, and being so entitled, he must do the work properly (*a*).

Medical Men—Certificates under Lunacy Acts.—The cases in which damages have been claimed for negligence from medical men are not very numerous, and the few that have occurred have chiefly arisen from hasty and inaccurate expressions of opinion in medico-legal cases. It is not enough to allege that the opinion given was erroneous, and contrary to the conclusions at which other medical men would have arrived. No one is responsible for an opinion, however erroneous, if given honestly; but in forming his opinion he is bound to exercise ordinary care, skill, and caution; and the absence of this renders the medical man liable for all the consequences of his false report (*b*).

For illegal detention in a lunatic asylum damages may be recovered from the person applying for the warrant, the medical men who grant the certificate, and the keepers of the asylum who joined in the conspiracy (*c*); but under our reformed

et equo gerere: re gesta negotiove finito mandanti rationes reddere; id quod ex causa mandati comparavit cum fructibus et omni causa restituere actionesque acquisitas ei cedere," Warnkœnig, § 925.

(*a*) *Currie v. Colquhoun*, 2 S. D. 407.

(*b*) *Urquhart v. Gregor*, 3 M. 283.

(*c*) *M'Cosh v. M'Cosh*, 10 S. 579; *Strang v. Strang*, 11 D. 378; *Mackintosh v. Fraser*, 21 D. 783; *Mackintosh v. Smith and Lowe*, 2 M. 389.

lunacy law such a case can hardly now occur, and in point of fact, during the thirty years since the existing Lunacy Acts came into force, not a single case of illegal detention is recorded. The key of the system is the close supervision exercised by the General Board of Lunacy, which, through its medical members, is fully acquainted with the case of every inmate in each asylum. Knowing this, no superintendent will receive a patient without the Sheriff's warrant; no Sheriff will grant a warrant without two medical certificates; and no medical man will grant a certificate till he has seen the patient himself, and personally inquired into his recent history, as the statute requires him to do.

In giving an opinion on so obscure a matter as the existence of mental disease, a medical practitioner may readily, and from no fault of his, fall into error; but this is not enough to subject him in damages. The duty of investigating cases of alleged insanity, and of pronouncing an opinion thereon, is a professional duty required of the medical profession by the community, and exercised for the public interest. Therefore, when by mistake a sane person is sent to a madhouse, the persons granting the certificate are exempt from all responsibility, unless it appear that their certificate had been granted at haphazard, without making due inquiry or examination, and without applying their minds to the subject (*a*). For their further protection it has also been provided by one of the Lunacy Acts, that actions against medical persons in respect to certificates under the Lunacy Acts must be raised within twelve months of the supposed lunatic's liberation from the asylum, and shall be tried by the Lord Ordinary without a jury (*b*).

Right to sue in Contract or Delict.—The option of suing the delinquent in contract or delict, which is competent against legal practitioners as well as medical men, applies to claims against innkeepers, carriers, shipowners, and generally all

(*a*) *Mackintosh v. Fraser*, 21 D. 783, 22 D. 421; *Dickie v. Dickie*, 3 Mur. 509.

(*b*) 29 & 30 Vict. cap. 51, § 24.

“bailees.” But the practice has long prevailed of treating claims against a railway company as founded on negligence, and it is irrelevant to allege that the contract was made with another company, or that the injured passenger had not a ticket, or had passed the station to which he was booked; for the duty of carrying the passenger safely results from the mere fact of his being a passenger (*a*).

Double Liability—to one in Contract, to another in Delict.—The distinction here indicated between delict and contract also leads to other important consequences:—

As regards the defender's negligence, it may subject him in a double liability to two different persons—in contract to A., and in delict to B. A public carrier receives for safe conveyance under a contract with one person goods which are the property of another. The first is entitled to sue him for non-fulfilment of his contract, the second for the injury done to his property by fault or negligence; and if the latter is met with the plea that the bargain was not made with him but another, he is entitled to reply that the contract is no concern of his; the act was none the less a wrong to him (*b*). So also, although a contract can never create duties except as between the parties themselves, whenever there is a contract and something more,—deceit in bringing the party into it, or delict in the execution of it,—the person wronged may waive the deceit and sue on the contract, or he may waive the contract and sue on the delict; and any third party (it is thought), to whom by the contract he engaged to do a service, may sue him also for his fraud or negligence (*c*).

(*a*) *Marshall v. York N. & B. Ry.*, 11 C. B. 655; *Dalyell v. Tyrer*, 28 L. J. Q. B. 52; *Austin v. Gt. West. Ry.*, L. R. 2 Q. B. 442.

(*b*) Per Ld. Bramwell in *Martin v. Gt. Indian Pen. Ry.*, L. R. 3 Ex. 9, 14.

(*c*) This question is discussed in a text in the Digest. It is supposed that the tenant (*colonus*) of a farm-

house (*villa*) had told off one of his slaves to look after the furnace, and he, after lighting the fire, had fallen asleep, and the house was burned down. The tenant was answerable *ex locato*, if he had been negligent in choosing his servants. But if one man had lighted the fire and set another to watch it, who negligently attended to it, it was asked if the Aquilian

A. may make a contract with B. through the telephone, and it is but a step farther to suppose that they both avail themselves of the electric telegraph as the medium of communication. If a mistake is made in the transmission of the message, is the receiver without a remedy? The question can never occur in this country, now that telegraphing is the business of the State; but before the transfer of the telegraphs to the Post Office, several cases had occurred in which action had been denied against the Telegraph Company at the instance of persons who had been injured by a mistake in the message (*a*). In America, on the other hand, one who receives a telegram which, owing to the negligence of the Telegraph Company, is altered or in other respects untrue, is invariably permitted to maintain an action against the Telegraph Company for the loss that he sustains through acting on that telegram. This undoubtedly is a rule of great practical convenience, and once it is settled operates not unjustly for all the three parties—sender, receiver, transmitter—contracting on the faith of it (*b*).

An analogous case has been put by Lord Bramwell: "Suppose A. lets B. a horse; B., with C.'s licence, puts up at C.'s stables for reward to C. from B.; C. turns into the stables loose a vicious horse, not to injure A.'s horse, but not thinking of the matter; there cannot be a doubt that C. would be liable to A. if the horse was injured. So, if he gave the horse bad oats, which injured the horse, he would be liable,—though he would not be to A. if he omitted to feed him" (*c*).

Another instance occurs in building contracts where the work is let out in sections to different tradesmen,—the mason,

action applied? "I think," said the jurist (Neratius), "that an *actio utilis* is applicable as well against the man who fell asleep at the furnace, as against him who negligently attended to the fire." Dig. L. Aq. 27, § 9; Grueber, 211. This is one of the few instances in which the Lex Aq. applied where the fault consisted in the duty being left undone.

(*a*) *Dickson v. Reuter's Telegram Co.*, L. R. 3 C. P. D. 1; *Verdin v. Robertson*, 10 M. 35; *Henkel v. Pape*, L. R. 6 Ex. 7.

(*b*) Gray on Communication by Telegraph, § 71-73.

(*c*) *Hayn v. Culliford*, L. R. 4 C. P. D. 182, 185.

plumber, slater, plasterer, and joiner,—the joiner usually being taken bound to furnish the scaffolding to be used by the other workmen in the performance of their work. The joiner has been held liable to any of the men injured from a fall of the scaffold through defective material, although he had no contract with him. A ship is brought into dock under a contract with the dock company, by which they were bound to provide safe access to the vessel for all who have business on board, and staging for the use of painters engaged in the repainting of the vessel under a contract with the shipowner. One of these persons having been injured by the fall of the staging from its negligent construction, was held to have a direct action against the company. It was contended that the staging had been delivered into the control of the shipowner, and became, as it were, part of the ship; but it was decided that the dock company's responsibility was the same as if they had invited the different persons requiring to be about the vessel to come and use the dock, with the gangway and staging as incident to it (a).

Enticing Servants to desert.—There is another case yet to be considered. Suppose a wrongful act is done by C. in prejudice of the right arising to A. under his contract with B. Of this the cases which have occurred in connection with the enticing of servants to leave their service may be cited as examples. It is fixed by decisions, both in England and in Scotland, that a civil action will lie against any one who, by illegal means, induces an employer to dismiss a workman, or a workman to desert his service. The law is exactly the same whether the wrong is done to employer or employé; but the means used must be illegal (b). If a contract has been made between A. and B. that one of them shall go supercargo on a voyage to China, and C. tries to get him to break his contract, but in vain, his conduct, however malicious,

(a) *Smith v. London & St. Katharine's Dock Co.*, L. R. 3 C. P. 326; 6 R. 683.
Heaven v. Pender, L. R. 11 Q. B. D. 503.

(b) *Couper & Sons v. Macfarlane*,

would not be actionable; but if the engagement is to go to the West Coast of Africa, and C. prevails on him, *bona fide* by reason of the pestilential character of the climate, to throw up his appointment, no action would lie. To render him liable in damages, the object must have been accomplished, and his act must have been malicious.

These cases have sometimes been considered an anomaly, being an exception from the general law, that for breach of a contract no remedy exists beyond the contracting parties themselves. But there is ground for saying that it is no exception, but only an instance of a wider principle, that any wrongful act calculated and designed to affect a subsisting legal relation is illegal. The contract to be broken need not be a contract for personal service only. In the leading case of *Lumley v. Gye* (a), the person subjected to the illegal interference was an opera singer; in *Bowen v. Hall* (b) he was a brickmaker in possession of a secret method of glazing, who had contracted to furnish bricks at so much a thousand, and to supply no other person in the trade. In *Roxburgh v. M'Arthur* (c) a discussion arose as to whether the word fraudulently, wrongfully, or unwarrantably should be the word used in the issue putting to the jury the question, Did he prevail on or induce a workman employed by the pursuers to disclose a certain secret pattern? The expression should be sufficient to increase the *onus* beyond the persuasion which is consistent with *bona fides*, and for this purpose "wrongfully" was considered adequate. If the persuasion is used either for the purpose of injuring the pursuer or benefiting the defender at the pursuer's expense, it is a malicious act, which is wrongful both in law and fact (d).

Safety of Vehicles—Duty of Lessor.—In contracts for the use of articles which, if imperfect, may imperil the safety of

(a) 2 E. & B. 216; 22 L. J. Q. B. 463, Lord Coleridge dissenting.

(b) L. R. 6 Q. B. D. 333.

(c) 3 D. 556.

(d) Per L. J. Brett in *Bowen v. Hall*, *supra*, 338; *Rutherford v. Boak*, 14 S. 732; *Kerr v. Duke of Roxburgh*, 3 Mur. 126.

those who use them, the law implies a high degree of care, nearly approaching a warranty of sufficiency. When a jobmaster lets out a carriage on hire, the customer necessarily trusts that the man with whom he is dealing, and who makes it his business to provide such things for the accommodation of the public, will take proper care that it is safe and fit for the object intended. The selection of the vehicle, the horses, and the driver is all left to the jobmaster's own judgment; and if the carriage breaks down soon after starting, there is a presumption that its weak point could with due care have been discovered and remedied, or another vehicle substituted. To exonerate him from responsibility, it is incumbent on him to show that the accident was not preventible by any care or skill—*e.g.* that it arose from a latent flaw in the metal. If he can prove this (*a*), he will not be liable; but nothing short of this will do; for although not an insurer against all defects, his duty is to supply a carriage as fit for the purpose for which it is hired as care and skill can make it (*b*).

Duty of Dealers in dangerous things.—The same holds as regards articles which can only be safely handled with great caution. A vendor of a gun sold by him to be used by the members of the purchaser's family, which bursts and injures one of them (*c*); of a hairwash for the use of the purchaser's wife, which proves poisonous and deleterious (*d*); of a medical mixture carelessly compounded of wrong ingredients (*e*),—is apparently liable, either to the buyer on the ground of breach of warranty under the contract, or to the person injured on the ground not of contract but deceit (*f*). And when the seller's negligence is so gross as to amount to a fraud on the public—*e.g.* the labelling by a wholesale

(*a*) As the defender did in *Christie v. Griggs*, 2 Camp. 79; and the railway company in *Readhead v. Midland Ry. Co.*, L. R. 2 Q. B. 412.

(*b*) *Hyman v. Nye*, L. R. 6 Q. B. D. 685.

(*c*) *Langridge v. Levy*, 2 M. & W. 519, Ex. Ch. 4 M. & W. 337.

(*d*) *George v. Skirington*, L. R. 5 Ex. 1.

(*e*) *Dalzell v. Osborne*, 20 D. 55.

(*f*) *Longmeid v. Holliday*, 6 Exch. 661.

druggist of a bottle of belladonna as extract of dandelion, a subsequent purchaser, who bought from a retail druggist, was held to have a direct action for the injury he suffered against the wholesale dealer (*a*).

On the other hand, the builder of a ship or carriage, or the maker of a machine, or the vendor of articles not in themselves dangerous, is under no responsibility to those into whose hands they may come after they have passed out of his possession (*b*). Nor is a tradesman answerable for his negligence in fitting up a fixture to any one but the person privy to the contract (*c*). There would be no end of actions, it has been said, if we were to hold that a person having once done a piece of work carelessly should, independent of honesty of purpose, be fixed with liability in this way by reason of bad materials or insufficient work.

When Contract never completed, is Loss recoverable?—There are decisions to the effect that on evidence insufficient to justify the Court in enforcing the performance of a contract, the law will give damages, not for its breach, but for acts done and expenditure incurred on the faith that it would be performed; but to warrant this, two conditions require to be satisfied—(1) There must be legal proof, parole or written, of the agreement; and (2) that the expense was incurred, or suffered to be incurred, on the faith of the agreement (*d*).

A contract also to warrant an action of damages must involve some civil and patrimonial interest. Men may associate themselves under rules and regulations for innumerable purposes,—scientific, spiritual, and religious,—but so long as these do not involve civil or patrimonial rights, no action will lie either for implement or damages. “Two persons,” says Lord Deas, “agree to ride together, to dance together, to

(*a*) *Thomas v. Winchester*, Biglow's L. C. 602; *Dixon v. Bell*, 5 M. 495.

& S. 198.

(*b*) *Winterbottom v. Wright*, 10 M. & W. 109.

(*c*) *Collis v. Selden*, L. R. 3 C. P.

(*d*) *Walker v. Milne*, 2 S. 338;

Bell v. Bell, 3 D. 1201; *Heddie v.*

Baikie, 8 D. 376; *Allan v. Gilchrist*,

2 R. 587.

sing or play together, to travel together; the one breaks his engagement, and the other shall have no redress. But if the one has agreed to pay the other for the instruction to be derived in riding, dancing, music, or any other branch of study, or for accompanying him as his courier or *valet de place*, the law will give redress to the party injured by the breach of that agreement. So it is in other matters, less or more important. The case is not varied by the introduction of the religious element. A number of persons agree to constitute themselves an association to read the Bible together, to pray together, to worship together in any form which the law sanctions or tolerates, and the law will not interfere whether they keep or break such engagements" (a).

Relation of Damages to similar Remedies.—It is necessary now to refer for a moment to some other remedies with which a claim of damages has a certain relationship, but from which it ought to be distinguished.

Liquidate Damages—Penalty. In adjusting the terms of a contract it is often found convenient to fix beforehand the compensation which shall be paid in the event of a violation of its conditions. The damages are not capable of accurate calculation; but it becomes a term of the contract that the sum fixed shall be payable as pactional or liquidate damages, irrespective of the actual loss sustained. It may also be agreed that the contract shall be performed under a certain penalty; and in that case, while the penalty is taken to cover the whole damages recoverable, the actual damage only may be recovered as that shall be ascertained in the usual way (b).

It is often an important question under an agreement, to

(a) *Macmillan v. The Free Church, Associated Carpenters and Joiners* 23 D. 1314–1346. As to right of action against Trades Unions, see *of Scotland*, 12 R. 1206.
 (b) *Forrest & Barr v. Henderson, M'Kerrian v. United Operative* 8 M. 187; *Gold v. Houldsworth*, 8 *Masons' Association*, 1 R. 453; *M. 1006.*
Shanks v. Do., 1 R. 823; *Aitken v.*

which of these two characters does the stipulation belong—is it penal or pactional? What the contract itself calls it—whether “penalty” or “liquidate damages”—is not to be disregarded, but is by no means conclusive, and the Court finds out for itself—from a consideration of the terms of the deed—whether the parties intended the sum named to be penal or not. If penal, it must be so treated, and will be modified in accordance with the equity of the case; if it is not, the sum fixed must be paid, for it has been said that there is nothing illegal or unreasonable in the parties by their mutual agreement settling the damages, uncertain in their nature and amount, at any sum they may agree (*a*).

To assist the Court in the task, certain rules have been laid down as judicial aids. (1) When a single lump sum is made payable by way of compensation on the occurrence of one or more or all of certain events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification (*b*). (2) But where it is agreed that if a party do, or omits to do, a particular thing, a certain sum shall be paid by him, then the sum stated may be treated as liquidated damages. Thus, where a mineral lease gave the lessees the use of some land for the deposit of slag on condition that £100 per acre should be paid for all land not restored by a particular date, this, though described in another part of the contract as “the penalty therein stipulated,” was held not to be a penalty, but stipulated or estimated damages. And generally it may be said that the same principle of decision will be applied where the contract fixes the rate of payment only, and makes the total payment proportional to the damage done, as when a tenant binds himself to farm according to a certain rotation, or otherwise to pay a certain penal rent of so much per acre (*c*). The deviation may have been beneficial to the landlord, but the pactional rent is due all the

(*a*) Per Tindal, C. J., in *Kemble v. Stone v. Monkland Iron Co.*, L. R. 11 App. Ca. 332.
Farren, 6 Bing. 141, 148.

(*b*) Per Lord Watson in *Elphinstone*. (*c*) *Elphinstone*, *supra*.

same (a). The like holds as to contracts for the sale of a business or professional practice; the vendor binding himself not to practise within a given period inside a certain area. It is hard to say what the damages may be if a breach of such an agreement is committed, and they are therefore properly fixed beforehand. A third case is where a debt is secured by an obligation to the effect that the debtor will pay a larger sum, or will forfeit something else if it is not paid by a certain date. Here the obligation is treated as a mere pledge for the debt, and it is the practice to reduce the penalty to such a sum as will in the circumstances afford adequate compensation. A debtor, however, is not entitled to pay the penalty and refuse performance, for the penalty is always by and attour performance (b).

Restitution. We have seen that a party deceived has his choice; he may either reduce the contract, or he may claim damages without reducing it. But rescission always implies *restitutio in integrum* (c), and that on both sides; for he who seeks must also give restitution, and where this cannot be made the contract must remain in force. Suppose, for instance, the transaction related to a purchase of shares from the directors of a company induced by their fraud; until the winding up, the person entrapped into joining the company may insist as against the company to get out of it, for his joining it was the fraud of their agents, for which the company is answerable; but after the winding up it is too late to rescind, and his only remedy is damages against the directors personally (d).

The requisite conditions of restitution are—(1) that the

(a) *Baird v. Mount*, 2 R. 101; *Orr v. McKenzie*, 1 D. 1046. As to what expenses it covers, see *Gordon Miller v. Gwydir*, 2 W. & S. 52.

(b) *M'Elroy v. Tharsis Sulphur & Copper Co.*, 5 R. 161; *Robertson v. Driver's Trs.*, 8 R. 555; *Shaw v. Morrison*, 4 R. 637. In building contracts, *Johnston v. Robertson*, 23 D. 646; *Craig v. M'Beath*, 1 M. 1020 (form of issue). In a bond, *Jamieson v. Beilby*, 13 S. 865;

(c) *Oliver v. Suttie*, 2 D. 514.

(d) *Amaan v. Henderson*, 3. M. 526; *Stair*, 1. 9. 14; *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Ca. 317.

claimant has sustained lesion of a certain gravity—either in his property or some other material interest; (2) that his claim is founded on a just or adequate cause (*justa causa*).

Minority, violence, error, fraud, were among the grounds of relief recognised by the Roman law. But even where the two conditions above named (*læsio et justa causa*) were combined, restitution was refused against the consequences of an act maliciously or fraudulently committed, or when the person had approved expressly or tacitly of the act against which the remedy would otherwise have been competent (*a*). Repetition (*condictio indebiti*) of money paid in error, or for which the consideration has failed, is a sub-branch of the general doctrine of restitution.

Recompense. This is a claim which is often confused with reparation, with which it has nothing in common. The principle of recompense has been thus explained by Lord Neaves (*b*): “Where a man, in the honest although erroneous belief that a heritable subject is his own, spends money and makes improvement on it, the person who finally makes good his title to the property is not allowed to have the benefit of the other’s meliorations without making recompense.” Lord Stair has carried the doctrine too far, when he says recompense is due by the party *lucratus* to the party who has built in *mala fide* on another’s ground (*c*). The modern cases distinguish between the case where one, honestly believing the subject to be his own, spends his money on it with the result of benefiting another *sine animo donandi*, and where the party being in possession on a good but limited title makes alterations on the subject for his own convenience and comfort (*d*). In the former case there is essential error, which is the foundation of the claim; in the other there is no error at all. The claim implies—(1) no title or a bad title; (2) *bona fides*—meaning that he supposed his title good on

(*a*) Goudsmit’s Roman Law, 344. 779*b*, 1237–9; *Nelson v. Gordon*,

(*b*) In *Buchanan v. Stewart*, 2 1 R. 1093; *Reedie v. Yeaman*, 12 S. R. 78; *Rankin v. Wither*, 13 R. 903. L. R. 625; *Fernie v. Robertson*, 9

(*c*) St. i. 8. 6. M. 437; *Paterson v. Greig*, 24 D.

(*d*) Story’s Eq. Juris., § 386, 779*a*, 1370.

reasonable grounds; (3) the expenditure of money not referable to some other interest unaffected by the want of title; and (4) disappointment through some unexpected cause of reaping the fruit of that expenditure. It is always an important question whether he was not acting with full knowledge of the temporary nature of his interest; as when a house belonging to a married woman is occupied by herself and husband, and he spends money upon it on the understanding that at her death it will pass to him by will. He has no claim against the heir if the wife dies suddenly and intestate. On the same ground, when property is appropriated through an innocent or excusable mistake, the person in fault is bound to give up all the benefit which he has derived from what never belonged to him; and it is not enough to tender the value of the article to the donor at the date and place of appropriation. A curious illustration of this occurred some years ago, and was settled by a referee. Edinburgh has two gas companies; their pipes lie side by side in some streets in the same trench, and the workman of company A. when making a connection, joined it not to their own pipe, but to that of the other company. It was several months before the mistake was discovered and rectified, and the account was ultimately settled by the company whose gas was abstracted receiving the value of a certain estimated quantity of gas. In a court of law this would have been treated as its selling value, without any abatement for the cost of distribution. A mine-owner who crosses the boundary and extracts his neighbour's coal, is liable for its value at the pit-head, but is allowed the expense of getting, and severing, and bringing to bank, if he acted from inadvertence; of bringing to bank, but not of severing, when his error was due to negligence (*a*).

Damages as a Counter Claim.—An illiquid and unconstituted claim of damages cannot be pleaded against a liquid debt by

(*a*) *Livingstone v. Rawyards Coal* collected in *MacSwiney on Mines, Co.* (a very special case), L. R. 5 535.
App. Ca. 5. The English cases are

way of compensation (*a*) ; but it is not a plea of compensation to urge that under the contract sued on the pursuer has not duly implemented his part of the contract, and must submit to a reduction of his claim to meet the damage so occasioned. No one can sue on a mutual contract without undertaking to prove that there has been due performance on his side, entitling him to exact performance from the other ; and when this is denied, the issue directly arises on the pleadings without any counter action being necessary (*b*). No man can exact payment of a debt without showing that he has given the stipulated value for it ; and therefore if a tenant is sued for his rent, he may competently prove that he had not possession of the prescribed acreage, and is entitled to a proportional abatement of his rent. But more generally the counter claim resolves into a question of damages for delay in the execution of the contract, or for its negligence and imperfect execution. "It is always competent," says Lord President Inglis, "when one party sues the other upon a contract entered into between them, for the latter to say, 'You broke the contract, and instead of my being in debt to you, you are in debt to me.' This form of defence amounts in substance to an action of damages" (*c*).

(*a*) 1592, c. 143.

(*c*) *Sharp v. Rettie*, 11 R. 745,

(*b*) *Johnston v. Robertson*, 23 D. 751.

CHAPTER III.

THE LIMITATIONS OF RESPONSIBILITY.

Examination of the Action from the Defender's View.

Pupils.—In the law of contract, it is not every one who can enter into a binding agreement. Such as are incapable of consent, idiots, pupils, etc., cannot contract; but in the reparation of injuries there are no such limitations, for generally speaking the person who is physically capable of doing an injury is bound to make good the loss of which he has been the cause (*a*). A pupil has no person in the legal sense of the word; he is incapable of acting, or even of consenting (*b*); but he may be tried for rape (*c*), and in a very old case it was settled that an action of spuilzie will lie against a pupil for property wrongously taken away by him or his guardian (*d*). It would be absurd to sue a boy for a slanderous statement made to his nurse; but pupils are daily tried and punished for such malicious acts as firing a stack of grain, and when sued civilly, there is no reason for saying that his childish thoughtlessness would be accepted as any excuse. For a child's delicts, however, the parent is not responsible, and the damages have to be recovered from his separate estate.

(*a*) Dig. L. Aq. (9. 2) 5, § 2, *Aquila eum et hoc puto verum si sit jam injuriæ capax.*
“Quærimus si furiosus damnum dederit an legis Aquiliæ actio sit? (*b*) Ersk. i. 7. 14, “*Infans et Et Pegasus negavit, quæ enim in qui infantie proximus est non multum a furioso distant.*”
eo culpa sit quum suæ mentis non sit? Et hoc est verissimum . . . (*c*) *H.M. Adv. v. Fulton*, 2 Swin. 564.
Quod si impubes id fecerit, Labeo, (*d*) *Somerville v. Hamilton*, M. 8905.
ait quia furti tenetur, teneri et

Lunatics.—It agrees with the view here expressed to say that a lunatic, although not punishable for his criminal act, is not exempt from the duty of indemnifying a person who has suffered at his hands when he has the means of making compensation. It is now held that a lunatic's contracts are not void, but voidable in the option of the curator; and when a lunatic is possessed of separate estate, it is just that it should answer for the mischief which may be suffered by others at his hands (*a*). Accordingly the law of England holds a lunatic civilly answerable for his torts although wholly incapable of design,—a doctrine flowing from the general principle already indicated, that whenever one person receives injury from the act of another, intent to do the injury is not necessary to be proved. In America the rule is, that legal liabilities may be enforced against idiots and lunatics, whether the mental incompetency be established or not; and one curious example of its application is a case in which a magistrate had conducted himself in a ferociously oppressive manner, and was found liable in damages for so doing, although, on inquiry, it turned out that he had been all the time mad (*b*). The persons who suffer are the relatives interested in the estate, and they cannot complain of the operation of the rule, for it is their own fault that he has not been sooner secluded from society, and put out of the way of doing harm to himself or others.

Married Women.—Prior to 1877 a husband was liable for debts contracted by his wife before marriage (including an unsatisfied claim of damages), even although they exceeded the moveable estate; but this liability is now limited, when the marriage has taken place subsequent to the 1st of January 1878, to the amount of the property received in right of the

(*a*) *Weaver v. Ward*, Hob. 134; (*b*) *Ordranax's Judicial Aspects of Bacon's Abridgement, Trespass, Insanity*, 332; *Mordaunt Case*, per (G); *Cross v. Andrews*, Cro. Eliz. Kelly, C. B., 2 P. & D. 109, 142; 622; *Broom's Coms.* (7th ed.), rev. H. L. 2 H. L. (Sc.) 374.

wife before or after marriage (*a*). As regards acts committed by the wife during marriage, the husband has never been held liable. Any vicarious responsibility incurred by a man in respect of his wife rests on the theory that she is his agent in the management of his domestic concerns. He may so order the management of his establishment as to put his wife in his place, he himself going abroad and leaving everything to her care; and in such a case he will be liable as principal for the acts of his wife as his agent. This was so found when a married woman with the help of her servants, during the absence of her husband abroad, demolished a neighbour's mill (*b*). But save in a case of agency, the one spouse is not liable for the act of another civilly or criminally. The husband is not liable for his wife's vitious intromission (*c*), nor for his wife's slander (*d*); and when a number of married women rose upon a messenger and forcibly rescued a prisoner then in his hands, the judgment was that the women were answerable in damages, but not the innocent husbands, to creditor or messenger (*e*). In all cases where the wife is found liable in damages for her own personal delict, the creditor by the common law is practically without a remedy till she is emancipated by the death of her husband, or the relationship is otherwise brought to an end. Execution cannot pass against the goods in communion, for these have been assigned to the husband *jure mariti*; and to imprison him for his wife's delict, would be punishing one for the offence of another. Accordingly, the pursuer's remedy lies exclusively against any separate estate of the wife exempt from the *jus mariti*. Thus, "a wife of Kirkaldie being pursued, and her husband for his interest, for injuring her neighbour with words, before the Commissary of St. Andrews, is decerned to make her repentance, and to ask the party's pardon, and to

(*a*) *Wishart v. City of G. Bank*,
6 R. 823.

(*b*) *Stair*, i. 4. 17; *Elch. Annot.*
20. *Ludquairn v. E. Marischal*, M.
13,982, 1 *Fraser* 561.

(*c*) *Allan's Exrs. v. Lauder*, M.
5931; *Brown v. Dalmahoy*, M.
5932; *M'Quail v. M'Millan*, 5874.

(*d*) *Barr v. Neilsons*, 6 M. 651.

(*e*) *Murray v. Graham*, M. 6079.

pay £40 therefor; and the husband being charged to pay the money for his wife's misbehaviour, suspends, seeing if she did any wrong to her neighbour by word it was without his tolerance done. The Lords suspended the letters for the money, but found them orderly proceeded, for her personal satisfaction" (a). Where a married woman is pursued for a delict, the process cannot proceed if the husband is not called (b). But the fact of his being cited does not make him liable for the expenses ultimately decreed for, except in so far as he was responsible for the conduct of the cause, in so far as the same was "malicious, vexatious, and calumnious" (c). By the latest statute on the subject (44 & 45 Vict. c. 21) it is enacted that where a marriage is contracted subsequent to the date of the Act (18th July 1881), and the husband is at the time domiciled in Scotland, the whole moveable and personal estate of the wife, whether acquired before or during the marriage, is by operation of the law vested in the wife as her separate estate, and shall not be subject to the *jus mariti*.

Aliens.—It has been said that our courts are more open to admit actions founded on foreign transactions than those of any other European country (d); but an action here is not entertained for a wrong committed abroad except on two conditions—(1) That the act would have been a wrongful act if committed here. On this ground, although the law of Belgium holds a ship answerable for a collision caused by a pilot, the Judicial Committee pronounced against a suit brought in England for a collision in Belgian waters, because, by English law, a shipowner is not answerable for a pilot whom he is obliged to employ (e); (2) that the act is actionable by the law of the place where it was committed. On this ground Admiral Napier, when in the service of the

(a) *A. v. B.*, M. 6072.

(b) *Freebairn v. Grant*, M. 6080.

(c) *Baillie v. Chalmers*, 3 Pat.

Ap. 213; *Gordon v. Pain*, M. 6079;

Izatt v. Robertson, 2 D. 476; *Friend*

v. Skelton, 17 D. 548; *Barr v. Neilsons*, *supra*.

(d) Per Willes, J., in *Phillips v. Eyre*, L. R. 6 Q. B. 1. 28.

(e) *The "Halley"*, L. R. 2 P. C. 193.

King of Portugal, was held not liable for capturing an English ship trying to break the blockade, although his serving a foreign prince was contrary to English law (*a*). In a recent case, however, of a slander uttered at Penang, the Court rejected the plea that, by the law of Penang, no reparation is due for oral slander, and held that both parties being domiciled Scotchmen, the case fell to be tried as if the slander had been uttered in Scotland (*b*). It may be observed that what is a discharge of a debt in a country where the debt is contracted is a discharge of it everywhere (*c*).

So far as any limitations on responsibility are recognised, they do not rest on personal considerations affecting the capacity of the wrong-doer, but have been imposed in the public interest for the protection of persons acting in a public and official capacity.

The Crown.—The maxim, “the Queen can do no wrong,” rests on the fact that under the British Constitution the sovereign acts on the advice of Ministers, who are responsible to Parliament, and Parliament to the people. But apart from this, to hold the sovereign liable in damages to a subject would be inconsistent with the constitutional independence of the Crown, and hence the maxim of English constitutional lawyers: “You cannot sue the Crown in tort” (*d*).

In early times, when the King of Scotland desired to invoke the assistance of his judges against a subject, he sued in person; but it was deemed beneath the royal dignity to appear in any character but pursuer (*e*). When the Crown came to be summoned, the action was directed against the Officers of State. All actions by or against the Crown have long proceeded in name of the Officers of State, and latterly of the Lord Advocate as their representative (*f*).

(*a*) *Dobree v. Napier*, 2 Bing. N. C. 781.

(*b*) *M'Larty v. Steele*, 8 R. 435.

(*c*) *Phillips v. Eyre*, *supra*, 30.

(*d*) *Tobin v. The Queen*, 16 C. B. (N. S.) 310.

(*e*) Lord Medwyn in *King's Adv. v. Dunglas*, 15 S. 314.

(*f*) 20 & 21 Vict. c. 44; *Maitland v. M'Clelland*, 23 D. 216.

In former times the rule was that the Crown neither demands nor gives costs (*a*); but under the 19 & 20 Vict. c. 56, costs may be awarded against the Crown "in all causes depending before any civil court in Scotland," as in any case between subject and subject (*b*). Another of its privileges is that it shall not be bound (without its express consent) by any statute imposing a tax or burden. This is part of the prerogative of the Crown of Great Britain, which it has inherited from the Crown of England. But no such immunity belonged to the Crown of Scotland prior to the Union; and the privilege is not pleadable as regards that part of our statute law which was passed by our Parliament when the country was a separate kingdom (*c*).

In England, questions which may arise out of the administration of public affairs affecting the rights of an individual are tried under a petition of right, the theory of which is this:—The subject applies to the Queen for leave to sue Her Majesty as he might have sued a subject; the answer returned is, "Let right be done" (*d*). In Scotland the action is brought against the Lord Advocate as representing the department immediately concerned. Claims founded on contracts and grants made on behalf of the Crown may be judicially inquired into in this manner, as well as claims of damages for breach of contract (*e*). It may also be noted that in many colonies the Crown is in the habit of undertaking works which in this country are usually performed by private persons; and it has been found expedient to allow the Crown to be sued in tort (*f*).

Departments of State.—No department or sub-department of State is responsible to a private party for the consequences

(*a*) *Breadalbane v. Smith*, 12 D. 602.

(*b*) *White v. Simpson*, 1 M. 72.

(*c*) *Crown v. Mags. of Inverness*, 18 D. 366.

(*d*) Now regulated by 23 & 24 Vict. c. 34; *Att.-Gen. v. Kirk*, L. R. 14 Eq. 558.

(*e*) *Windsor and Annapolis Ry. Co. v. The Queen*, L. R. 11 App. Ca. 607.

(*f*) *Farnell v. Bowman*, L. R. 12 App. Ca. 643; *Att.-Gen. Straits Sett. v. Wemyss*, L. R. 13 App. Ca.

of acts committed in the administration of government. The officer who is immediately involved is personally liable for his own default; and if he pleads an order issued by his official superior it will not exempt him from responsibility, for an illegal command is binding on no one. But no superior officer, such as the Postmaster-General (*a*), the Lords Commissioners of Customs and Excise, the Auditors of Exchequer, and the like, is responsible for the negligence and misconduct of a subordinate, even when he appoints him and has the power of dismissing him. They are the servants of a common master, viz. the Crown, which is not answerable to the courts of law in such a matter, and each must answer for his own personal default. Thus the captain of a king's ship lying in Leith Roads, when sued for an act of deforcement committed by his officers on board while he himself was on shore, was assoltized (*b*).

Ministers of the Crown.—On principles of public policy, no action is allowed against persons acting in a public character and situation which from their nature would expose them to an infinite multiplicity of actions, and often involve questions of State policy,—with which courts of law ought not to be permitted to intermeddle. The place for the discussion of all such questions, and the personal conduct of the Minister, is the House of Commons. It has accordingly been held that the Lord Advocate and his deputed are not responsible for anything done in the execution of their office, even where the act is said to be malicious (*c*). The case of *Gidley v. Lord Palmerston* (*d*) was an action brought against the Secretary of

(*a*) *Whitfield v. Lord le Despencer*, v. *Campbell*, 14 R. 725 (per Lord Young).
2 Cowp. 754.

(*b*) *Thorburn v. Ellis*, 24 May (d) 7 Moore 91, 3 B. & B. 275.
1811, F. C. The suppression by the Lord-Lieutenant of Ireland of a political meeting in the Phoenix Park is an act done in his political capacity for which no action lies in an Irish Court. *Sullivan v. Spencer*, 6 Ir. R. C. L. 173.

(*c*) "As against the Lord Advocate I do not think that a case of liability to damages could be even stated," per L. J.-C. Hope in *Henderson v. Robertson*, 15 D. 292; *M'Murphy*

War by a retired clerk,—not in tort, but for his retired allowance, which was dismissed on the broad ground of the great inconvenience which would result from holding a public agent acting on behalf of the nation as incurring any personal liability whatever for anything done by him in his public character and employment. “No man,” said the Court, “would accept of any office of trust under Government on such conditions; and indeed it has been frequently determined that no individual is answerable for any engagements which he enters into in their behalf. There is no doubt that the Crown will do ample justice to the plaintiff’s demands, if they be well founded.” Although this was said in an action *ex contractu*, it applies *à fortiori* to an action *ex delicto*; and, therefore, when an officer of the army sued his superior, the Commander of the brigade, for reports made to the Adjutant-General as to the conduct and fitness of the plaintiff, said reports, it was alleged, having been sent in with actual malice, and without reasonable, probable, or justifiable cause, and not in the *bona fide* discharge of public duty, the Court declined (C. J. Cockburn dissenting) to make any distinction between the honest and dishonest exercise of public authority (a).

On this principle also rests the right to refuse production of an official letter—received by the Minister as representing the State. Speaking of a certain complaint which had been made to Lord Liverpool, Lord Ellenborough laid it down, “that it was not competent to the plaintiff to get at a fact which is embodied in an official letter: nor could an extract be admitted, for the plaintiff was entitled to the whole or none” (b). The judge may rule that the document was not an official communication, and which, therefore, the custodier is bound to disclose; but whenever it appears to be official, it is incompetent for the Court to inquire further. In an action brought by a Customs officer against a Commissioner of Customs, founded on allegations said to be contained in a

(a) *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94.

(b) *Anderson v. Hamilton*, 8 Price 244n; *Wace v. Griffiths*, L. R. 2 P. C. 420.

report by him to the Board, the Court declined "to judge upon such actings." They could not call on the defender to account for his official conduct, nor require him to disclose confidential communications passing between the Board of Customs and the Treasury (*a*). The Lord Advocate is bound to tell the name of his informer and produce his information; but if he states officially that prejudice will arise to the public service from his producing the information, the Court will not compel him (*b*).

An exception has been made to the above general rules in the case of the Board of Trade (*c*). Under the Act 39 & 40 Vict. cap. 80, an action may be brought against the Secretary of the Board of Trade to recover compensation for the detention, without reasonable or probable cause, of a sea-going vessel by an officer of the Board; and the damages are paid out of the monies voted by Parliament (*d*).

It has been held that the English General Lighthouse Authority (the Corporation of the Trinity House) are not by virtue of the Merchant Shipping Act, 1854, constituted servants of the Crown so as to exempt them from liability to an action for negligence in the performance of their duties (*e*). But the history of this body is peculiar. It was originally a private Corporation owning beacons and lights, and gradually grew into the controlling authority in this branch of the public administration. The reason of the judgment, therefore, would not apply to the various Government Boards in Scotland—such as the General Board of Lunacy, Fishery Board, the Board of Supervision, the General Commissioners of Prisons, and the Commissioners of Northern Lights. These Boards are all sub-departments of State, direct emanations of the Crown, existing only for public purposes, in administering funds voted by Parliament, or levied by statute for national

(*a*) *Boyd v. Reid* (1801), Borth. 381.

(*b*) *Hill v. Fletcher*, 10 D. 37; *Craig v. Marjoribanks*, 3 Mur. 341;

Henderson v. Robertson, 15 D. 292; *Dickson on Evidence*, § 1850–54.

(*c*) *Hill v. Fletcher*, 10 D. 37; *Craig v. Marjoribanks*, 3 Mur. 341.

(*d*) *Dixon v. Farrar*, L. R. 17 Q. B. D. 658.

(*e*) *Gilbert v. Corp. Trinity House*, 17 Q. B. D. 795.

purposes. It is apprehended, therefore, that no action of damages for misconduct would lie against them in their corporate capacity.

Members of Parliament.—It is one of the maxims of the Constitution, that whatever is said or done within the walls of Parliament is not to be questioned elsewhere. The House itself can take no notice of a speech previously delivered unless the words objected to have been taken down at the time, for by the usage of Parliament this is the only evidence which can be received of what was said. No action lies for words spoken by a member of either House; and if the legality of a resolution of the House of Commons arises in course of an action before a court of law, the Court will examine it and decide the question for itself, seeing that the House, being a single branch of the Legislature, has no power to change the law by way of resolution. But its jurisdiction to regulate its proceedings, to decide all matters relating to its privileges, and the discipline of its members, is not open to question; and, for the same reason, if a member, according to his own statement, is wrongfully expelled, the officer entrusted with the duty of thrusting him out of the House is not answerable in damages before a court of law, for the matter was wholly within the cognizance of Parliament, and, in carrying out his instructions, the officer was bound to obey (*a*).

The law of this country does not appear to recognise the

(*a*) *Bradlaugh v. Gosset*, 12 Q. B. D. 270.

The point has never been determined whether a court of law has concurrent jurisdiction to punish a crime committed in Parliament—*e.g.* an assault on the Speaker. In the case of Sir J. Elliot, etc., this happened—the Speaker being forcibly held in his chair to prevent his adjourning till a certain motion had been made. The members were heavily fined and imprisoned by a

court of law, and some of them died in prison when undergoing the sentence; but on a writ of error to the House of Lords in 1668, the House quashed the conviction on the ground that part of the offence charged was a seditious speech, which, being made in Parliament, could not be inquired into outside of it. The question whether the assault on the Speaker would by itself have justified a conviction remained undecided. 3 Howell's State Trials, 294–336.

right of any public servant to decline the jurisdiction of a court of law. The Governor of a colony, for example, is not exempt from being sued before his own colonial court, or the courts at home, simply because he is Governor. He is not a Viceroy, exercising the royal functions by delegation: he is a mere servant of the Colonial Office, and to bar the interference of the courts of justice he must go farther, and show that the acts complained of were acts of policy within the limits of his commission, and were done by him as a servant of the Crown, so as to be, as they are sometimes shortly termed, "acts of State." Whether the act forming the subject of the suit is an "act of State" is a question of fact which the municipal law will itself determine; and if it is found to possess this character, the defence is complete, and the Court can take no further cognizance of it (a).

The Army and Navy.—The municipal law is binding upon all persons, and the fact of a man being a soldier in no way exempts him from his obligations as a citizen. But certain acts which are grave military offences, such as cowardice, desertion, mutiny, and conduct prejudicial to discipline, are not punishable by the civil law; while others, such as drunkenness, which are unimportant civil offences, are serious military ones. Accordingly, the statute called the Army Act, which is renewed annually (with occasional amendments), contains a code of military law for the discipline and regulation of the army (b). It was first passed under the name of the Mutiny Act, soon after a standing army was established in the year 1660, with the view of giving parliamentary sanction to the proceedings of courts-martial, which had been instituted for the trial and punishment of military offences. These courts-martial subsequently came to possess, subject to certain restrictions, concurrent jurisdiction with the ordinary tribunals in the punishment

(a) *Musgrave v. Pulido*, 5 App. 225; 6 Q. B. 1; 1 Sm. L. C. (7th Ca. 102; *Phillips v. Eyre* (the ed.) 658.
Jamaica rebellion), L. R. 4 Q. B. (b) 44 & 45 Vict. c. 58.

of criminal acts by soldiers, such as assault, theft, damage to property, etc., although such cases are generally notified to the police, and left to them to be dealt with as ordinary criminal cases.

When a soldier has any complaint to make of wrongful or injurious treatment, it is his duty to ask a non-commissioned officer to take him before the captain of his company, to whom he can state his case. If redress is not obtained from the captain, the soldier may ask that the case be referred to the commanding officer; and if satisfaction is not then forthcoming, he may further demand that his complaint be forwarded to the General of the district, whose duty it is to inquire into the circumstances and give the appropriate redress.

It has been sometimes argued, that for acts of malice and oppression, of which officers in command have been guilty out of the kingdom and beyond the reach of the law, redress should be obtainable from the courts at home; and it was the opinion of Chief Justice Cockburn that it would not be inconsistent with the maintenance of military discipline and the energy and decision expected of an officer in moments of difficulty and danger, to allow such actions to be brought, whenever his authority was intentionally abused, for the purpose of malice and oppression. But it is obvious that on questions relating to the conduct of military operations, or the enforcement of military discipline, a citizen jury is not so capable of forming an accurate judgment as a professional tribunal. Moreover, when an officer joins the service, he enters it on the express footing that he shall be content with the redress provided by the Articles of War, namely, an appeal to the competent military authority, and, if necessary, to the Commander-in-Chief. Courts of law have therefore uniformly refused to entertain complaints by military men against their superior officers (*a*).

An officer who has accepted a commission in Her Majesty's sea or land forces is not entitled to sever his connection with

(*a*) *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94, 108.

the service at all times or under all circumstances by going through the form of resigning his commission. This is inconsistent with the nature of his engagement, which is to serve the country reasonably, and until allowed to leave to give obedience to the orders of those who are over him. He may resign, but only at the proper time; and both time and occasion must be judged of by the proper authority. An officer who happened to be at the Cape with his ship when he received notice of a valuable appointment, came home to take it up, and was arrested on his arrival for desertion. The officer pleaded that being ashore with the commander's permission, he had, before taking passage in the steamer, sent in his resignation, and was thus no longer in the service. But the Court held that he had acted irregularly, and the arrest was valid (a).

When a question arises between an officer in command and one of Her Majesty's subjects as to the proper exercise of his authority, he must justify his conduct. He is not entitled, sitting as a member of a court-martial, to try a person not subject to military law (b), to punish a man for an act which is not an offence, or to pass a sentence which the Court over which he presided had no power to pass. For mistakes, however, committed in the performance of police duty on the high seas, *e.g.* taking into custody, under the Kidnapping Act of 1872, a vessel not truly subject to arrest, his liability in damages will depend on the same facts as would constitute a good defence in the case of any civil officer. He will not be liable in damages if it is proved that he *bona fide* believed on reasonable grounds that there was cause to suspect that an offence had been committed, and that it was his duty to act as he did (c).

If complaint be made at the instance of a subject of the Queen that he has suffered in person or property from hostile measures taken in Her Majesty's name by officers in com-

(a) *Reg. v. Cumming*, 19 Q. B. D. 13. (c) *Burns v. Novell*, 5 Q. B. D.

(b) *Comyn v. Sabine*, 1 Sm. L. C. 44.

mand of her forces, and without due authority, the question is whether the act complained of is an act of State. To give it this character, it should have been executed in virtue of orders from the home Government; but if at the time the officer was called on to face some grave emergency, and acted to the best of his judgment, without positive instructions, it is enough to exempt him from responsibility if the Government upon a review of the proceedings considers it its duty to sustain his action and ratifies what he did (*a*).

Nor will a British court of justice interfere to prevent the invasion of civil rights pertaining to a foreign State; for whenever a private individual invades the prerogative right of another State, the remedy is an appeal to the Government of the country to which the offending person belongs, and to enforce redress in the manner sanctioned by international law. All such cases are beyond the cognizance of municipal law (*b*).

Executive Officers.—*Sheriffs.*—The sheriff is both a judicial and an executive officer. He keeps the peace, which in England is the primary function of justices of the peace (whence their name). Under sundry ancient statutes these functionaries first came into existence for the suppression of riots, and their power of punishing the rioters came later (*c*). Two justices were entitled to raise the power of the county, *i.e.* command all persons to come and help them to put down the disturbance, and apprehend and lodge in prison, for the purpose of trial, the persons concerned. Sir S. Romilly adds that for this purpose they might call in the aid of soldiers also (*d*). In early times this executive power was as important as the duties which devolved on them in their judicial capacity. In Scotland the same authority has been from time immemorial exercised by the

(*a*) *Buron v. Denman*, 2 Ex. 167.

(*b*) *Day v. Emp. Austria*, 30 L. vol. ii. 328.

J. Ch. 690, and Cases Collected, 1 Sm. L. C. 713.

(*c*) Reeve's Hist. English Law,

vol. ii. 328.

(*d*) Romilly's Life and Letters, vol. i. 371.

sheriff, and the functions of the justices have been purely judicial. They hold a court for the trial of all such petty offences as tend to a breach of the peace. Lord Cowan has pointed out as rather a remarkable fact in the history of justices of peace, that the commission issued by Queen Victoria is, in all essential respects, the very same commission that has been issued since the time of Elizabeth (a). Although the justices of the peace now exercise both a civil and criminal jurisdiction, their court is essentially a criminal court, to which, at common law and under special statutes, a limited civil jurisdiction has been added. The sheriff, on the other hand, is the head of the police, and general conservator of the peace of the county, and is thus both an executive and judicial officer—two distinct functions which must be separately considered when any question arises as to his official responsibility.

As an executive officer, a sheriff's powers are necessarily very large, but still his authority is limited. Anything that he does which is not expressly or impliedly authorized by his commission, is legally void; and for a trespass so committed he cannot claim any protection in virtue of his office. But within the limits of his authority, an act done or ordered by him for the public interest, and the maintenance of the public peace, not prompted by actual malice against the individual,—however injudicious, imprudent, or even reckless it may have been,—cannot be made the foundation of a claim of damages. An official, placed in a position of public responsibility, where prompt and decisive action is often required, is not liable for an error of judgment. It is for the interests of justice and good government that he should not be deterred from doing his duty by the dread of personal actions, and the presumption in his favour is so strong that it is not easily displaced. On this ground, where complaint was made that a sheriff, engaged in suppressing some crofter disturbances in the Isle of Skye, had issued, "maliciously and without probable cause," general verbal instructions that an entire township should be taken into custody, the action

(a) *White v. Simpson*, 1 M. 72.

was dismissed, because it was absurd to suppose that he had malice against a whole population; and although, *prima facie*, it was an unusual proceeding, the inhabitants were not very numerous, and there had been serious rioting two days before, in which they had been all more or less concerned (a).

The same protection extends to communications passing between him and his subordinates, and official reports prepared for the information of his superiors. It may be sometimes necessary for the purpose of quieting the public mind and restoring public confidence, or for the sheriff's own vindication when his measures have been unjustly assailed in the press, that these reports should be published in the newspapers, and it then becomes a question of fact for the jury whether the publication is consistent with the continuance of *bona fides*. It has been said that the law on this subject is not yet fully matured, but the tendency of judicial opinion is against actions laid on such grounds (b).

The Procurator-Fiscal.—In the performance of his duties the sheriff is assisted by an officer called the procurator-fiscal,—so named from the circumstance that when he first came into existence his principal duty was to sue for and recover dues falling to the fisk. At this time, and for long after, the sheriff personally conducted inquiries into crimes, and in trying prisoners employed the fiscal to conduct the prosecution on behalf of the public. The fiscal, however, did not intervene till a trial became necessary. In theory the matter still remains on the ancient footing. The sheriff is the official responsible for proper measures being taken for the maintenance of public order, and for inquiries in all criminal cases; and the procurator-fiscal, who now does all the work, is the assistant or agent of the sheriff, whose advice he takes when necessary, but the sheriff, in delicate or important cases, may cause the precognitions to be led before himself. The procurator-fiscal, in fact, was simply a procurator with the Crown for a client. He was appointed by the sheriff, was dismissable at pleasure, was

(a) *Beaton v. Ivory*, 14 R. 1057.

(b) See Lord Young's opinion in *M'Murphy v. Campbell*, 14 R. 725.

permitted to carry on other practice, and was remunerated by fees, chargeable partly against the county and partly (through the sheriff) against the Exchequer.

Originally all communications with the Lord Advocate were made by the sheriff, who advised the precognitions taken by the fiscal, and gave him his instructions. But in course of time the procurator-fiscal came to correspond directly with the Crown Office, and now (practically) he communicates with and receives directions from the Lord Advocate without the intervention of the sheriff, except in cases of an exceptional character. The duties which now devolve upon a procurator-fiscal comprise generally the investigation and preparation for trial of all crimes and offences, whether at common law or under statute, which occur in his district, except such as are disposed of in police courts; the prosecution of all crimes and offences tried locally in the Sheriff courts; inquiries into cases of sudden and accidental death, which in England are the subject of coroners' inquests; and the investigation of cases of destructive fires, and mining and other accidents. Procurators-fiscal continued to be paid by fees for all work done by them until 1850, when it was arranged by the Lords of the Treasury that they should receive fixed salaries in lieu of fees, and eventually they have (with four exceptions) been placed on salary.

By an Act passed in 1877, while the appointment is still left in the hands of the sheriff, it has to be confirmed by the Home Secretary, and does not fall by removal or death of the sheriff. Nor can the fiscal be removed from office except by the Home Secretary, on a report by the Lord President and Lord Justice-Clerk as to his inability or misbehaviour (*a*).

Clerks of Court.—Public officials, other than those holding judicial appointments, are liable for negligence in the execution of their duties, both by common law and, in some cases, by statute. By A. S. 18 Feb. 1686, the Clerks of the Bills are made liable for the damage resulting either from accepting an insufficient cautioner, or from refusing a sufficient one;

(*a*) 40 & 41 Vict. c. 50, § 6.

and when in 1857 the Bill Chamber was placed under one clerk, it was enacted that he should be responsible for the reputed solvency of cautioners, and for consigned money (*a*). Malversation in office is punishable by the Court on Petition and Complaint (*b*); and in several cases Clerks of Court have been found liable for official negligence. Two of the Clerks of Session, unable to produce the execution of a summons of adjudication, were held liable for the loss (*c*). In suspensions the clerk has rendered himself liable for the debts charged for, or for which a *med. fuga* warrant has been granted, by neglecting to take caution, or accepting as cautioners persons who were not habite and repute responsible (*d*). They have been also held liable in damages for inadvertently issuing a precept of poinding against one of several defenders who had not been decerned against (*e*), and for issuing a defective precept, the charge following thereon having been suspended (*f*). In this case it was held that the measure of damages was not the debt in the decree, but only such part of the expense of trying the validity of the precept, in the litigation between the suspender and the charger, as was incurred after intimation of the defect had been made to the clerk. The charger was obviously under no obligation to defend a precept which was radically bad. "When," says Lord Glenlee, "a party trusts to the

(*a*) 20 & 21 Vict. c. 18, § 1; parties. Lord Mackenzie, however, *Simpson v. Fleming*, 22 D. 681; said he could not view the act of Stannars, M. 13,131; Sibbald, M. 13,139, corrected by Lord Balgray consignment as amounting to a discharge of the defender's debt, who, in *Brown v. Walker*, 7 S. 626, he held, remained liable for the full sum notwithstanding the consignment, which was made at his own risk. In *Scott v. Selbie*, 26 Feb. 1836, 14 S. 574, where a defender consigned the sum sued for in a bank,

which was selected by both parties, to await the orders of Court, and the pursuer ultimately obtained decree in terms of the libel, but the bankers had failed in the interim, the Court, in the special circumstances of the case, decided that the loss arising from the bankers' failure should be mutually borne by both

(*b*) 1 & 2 Vict. c. 118, § 30.

(*c*) *Horne v. M'Kenzie* (1735), M. 13,123.

(*d*) *Alston v. Riddell*, M. 13,957; *Primrose v. Comy. Clerks*, Elch., Pub. Off. 6.

(*e*) *Johnston v. Peder*, M. 13,959.

(*f*) *Henderson v. Drysdale*, 9 S. 536.

warrandice of another, he must always notify the fault, for this amongst other reasons, that the party bound in warrandice may settle the claim without further expense." In a case where a bond of juratory caution had been lost and another substituted, the Clerks of the Bills were found liable in damages, but only to the extent to which the party had suffered prejudice through the cautioner being in a worse condition at the granting of the second bond than at the time of granting the first (a).

A sheriff-clerk was in use to be authorized by the terms of his commission to appoint deputies "for whom he shall be answerable" (b); but in those days he was paid by fees, and it was natural to throw on him the whole responsibility. Now he is paid by salary, and the cost of the official staff is borne by the Exchequer, which is recouped by the fees drawn in the office. He differs in no respect, therefore, from any other Government official, and there is nothing to take his case out of the common law rule, that one public official is not answerable for another, even when the power of appointing and dismissing subordinates is vested in the head of the department. In a case in which the ground of action was an alleged irregularity in a process caption issued by the sheriff-clerk depute, Lord Chelmsford expressed the opinion that the sheriff-clerk principal ought not to have been joined in the action at all; but as the ground of action entirely failed, it was unnecessary to decide the point (c).

The Keepers of Public Registers.—The responsibility of the keepers of public registers for an error in the record is matter of special enactment. The Act 1693, c. 14, after directing the registration of all writs presented to the keepers exactly conform to the order in the Minute-Book, declares "the said keepers not observing the premises liable to the damage of the parties prejudged by the not due observing of this present Act." And the Act 1696,

(a) *Dewars v. Clerk of Bills*, M. 13,121.

(b) 6 Geo. IV. c. 23. *Heddie v. Garioch*, 5 S. 503.

(c) *Watt v. Ligertwood*, L. R. 2 Sc. Ap. 361.

c. 18, anent registration of sasines and other writs and diligences, concludes by saying, "that parties lesed by the omission or negligence of clerks to book and insert in the register such writs as are presented to them, and which they attest on the back to be registered, shall have action of damages against the heirs and representatives of the said clerks, though no such actions be commenced in the clerk's lifetime."

In an action founded on the former of these Acts, it appeared that in 1830 a creditor raised and executed letters of inhibition on the dependence of an action at his instance for a debt of £1271. In the record of inhibition the debt was erroneously entered at £1221, and in respect of this error it was held by the Court in 1846, and the House of Lords in 1849, that the diligence was not duly recorded, and therefore ineffectual (*a*). The representatives of the keeper responsible for the error (who had since died) were found liable "in such damages, if any, as shall be proved to have resulted from the denial of effect to the inhibition in the process of ranking and sale of the original debtor's estates."

In the above case the action concluded for the whole debt, which raised the point how far a party sought to be made liable by a creditor for the mal-execution of diligence was entitled to take other exceptions to it, in order to show that, apart from the particular blunder, it was practically inept, and no damage had been sustained. As the Court decided that all the objections taken were too critical to be of any force, it was unnecessary to pronounce on the relevancy of the defence in the peculiar circumstances in which it was presented. But the result of the examination of the cases showed that they were divisible into two classes. 1st, Where no objection is stated to the validity of the debt or the regularity of the diligence, the messenger, jailor, writer, or other official in fault (for the same principle applies to them all) is not entitled to found on circumstances personal to the debtor in reduction of damages, for it is impossible to tell what effect these circum-

(*a*) *Davidson v. M'Kenzie*, 19 D. 226.

stances might have on the diligence forcing payment. The debtor might be insolvent, yet have the money in his pocket, or a friend at hand to pay the debt, to save him from jail. The debtor himself would have had no good objection to the debt, and the official whose negligence had rendered him liable as for the debt was in no better position (a). But, 2nd, where there existed a prior flaw in either the decree or diligence, which the debtor himself or his creditors in a competition might have pleaded, the official at fault is entitled to point it out; for when he pays the creditor the debt, he is entitled to an assignation of it; and if no debt existed, or the diligence was already worthless from prior irregularities, this was a condition with which it was impossible to comply (b).

Judicial Officers.—To assure the efficient administration of justice, which is the primary object of all government, the law throws a shield round the judicial office which practically amounts to a complete immunity from actions of damages. When a judge has decided according to the best of his judgment, *sedente curia*, on a matter properly before him, any question as to whether the proceedings have been legally taken, or the parties were fully heard, or the decision was sound, cannot be inquired into except on the record itself, and that only for the purpose of correcting a mistake, if any has been committed. The judge himself is not responsible even when he has been guilty of misconduct. No action lies against him for acts done or words spoken by him in his judicial capacity in a court of justice. The exemption is not confined to the judges of the supreme court, for the object of the rule is to secure judicial independence, and it is better that individuals should suffer rather than that judges should be hindered in the free exercise of their office without fear or favour, by the dread of having to answer for their con-

(a) *Chatto v. Marshall*, 17 Jan. 1829; *Adam v. Bailies of Ayr*, M. 1811, F. C.; *M'Millan v. Gray*, 2 3748; *Potter v. Baillie*, M. 7788; March 1820, F. C. *Wylie v. Bailies of Wigtown*, M.

(b) *Sinclair v. M'Lellan*, 12 Feb. 7793.

duct before an ordinary jury. It has accordingly been frequently decided that allegations that a judge acted maliciously, corruptly, falsely, or without reasonable cause, are insufficient to make the charge relevant. It has been so held in the case of a judge of the supreme court (*a*), a sheriff-substitute (*b*), and a county court judge (*c*). There seems, however, to be this difference between a supreme and inferior judge. A supreme judge cannot be sued at all, for he possesses a general jurisdiction. An inferior judge possesses only a limited authority—limited as regards area, and limited as regards the range of his jurisdiction; and when he usurps a jurisdiction which does not belong to him, he loses his protection, provided from the facts before him the want of authority might have been seen (*d*). He is also entitled to deal summarily with conduct or language amounting to contempt (*e*), or to order the removal of any one interrupting the business of his Court, but not for no reason at all, or some reason worse than none, as that the party had been guilty of swearing falsely in some other case a year before (*f*).

The same immunity is enjoyed by arbiters for their judicial acts, for it is the policy of the law to encourage the settlement of disputes by these private arrangements. They are not liable to the contracting parties for error of judgment into which they may happen to fall, unless the error arises from corruption and malice (*g*). Corruption does not lie in the mind but in the feeling, and it need not take the gross form of selling the award for a sum of money. It is enough to show that, swayed by interest, passion, or prejudice, the arbiter was incapable of holding the balance even between the parties. The proof of unfairness must be gathered

(*a*) *Hoggart v. Hope* (1824), 2 S. C. 28; *Houlden v. Smith*, 14 Q. B. App. 125. 841.

(*b*) *Hamilton v. Anderson*, 18 D. 1003, affd. 20 D. (H. L.) 16, 3 App. 361.

Macq. 363. (*f*) *Wilks v. M'Lachlan*, 1 Ex.

(*c*) *Harvey v. Dyce*, 4 R. 265; D. 376.

Scott v. Stansfield, L. R. 3 Ex. 220. (*g*) Per Ld. Curriehill in *M'Millan*

(*d*) *Calder v. Halkett*, 3 Moo. P. v. *Free Church*, 24 D. 1282.

from the proceedings; and although the arbiter is a competent witness at the trial, he may decline to explain his reasons (*a*).

Local Authorities.—A corporation is a collection of persons united together for some common object, and the effect of incorporation is to make the general body a person distinct from the individual members of which it is composed, capable of holding property and of suing and being sued before the courts of law in its corporate name, or in the name of the clerk or some other official called on its behalf. It is also a person which never dies, for as members change or die out others come in and take their place. Corporations are created by Royal Charter or Act of Parliament. The Royal Burghs of Scotland, the burghs which have been constituted under the Police Act of 1862, the boards which have been erected for the management of schools, poor relief, and the public health, commissioners of supply (*b*), and meetings of heritors (*c*), are examples of corporations for public purposes.

When an administrative body is called into existence for the performance of public duties, the intention is, if there be nothing in the statute to the contrary, that it shall be under the same obligations as the general law lays upon an ordinary individual. As a corporation it is capable of the relation of debtor and creditor, and is responsible for the acts of its officials in the same way as a master is responsible for his servants. In 1839, in the case of *Duncan v. Findlater* (*d*), the House of Lords denied this doctrine, which had been in familiar application in our courts for many years; and in an action which was brought against road trustees by a traveller on the highway, who had been injured through the negligence of the road surveyor in leaving an obstruction on the road, their Lordships decided that the action was not maintainable. The reason assigned was that

(*a*) Lord Neaves in *Cameron v. Menzies*, 6 M. 279; *Mitchell v. Cable*, 10 D. 1297; *Millar v. Millar*, 17 D. 689.

(*b*) 31 & 32 Vict. c. 82.

(*c*) *Boswell v. Duke of Portland*, 13 S. 148.

(*d*) 6 Cl. & F. 894.

the road trustees, being possessed of no funds except such as they were bound to expend upon roads, had no means to meet such claims. The decision was received with much surprise in Scotland, but continued to be followed until the year 1866, when it was reversed by the House of Lords itself in the case of the *Mersey Docks v. Gibbs* (a). This case established that a public board acting as a local administrative body is answerable for the negligence of its servants just as if they were the servants of a private person and not of a corporation incorporated for public purposes, and that such claims fell to be met, not by the individuals composing the board, but by the board itself out of its own proper funds, like any other debt (b).

Royal Burghs.—A corporation, such as the magistrates and council of a burgh, may be sued in three different characters: 1st, for acts done by them as trustees *virtute officii*, but not as representing the community; 2nd, for acts done by them as the agents of the community in the administration of the common good, and in the discharge of duties imposed on the community; 3rd, as proprietors.

1. In the first case, it is to be observed that the magistrates and council do not constitute the burgh; nor are they the proprietors of the funds and property belonging to the burgh. They are the mere office-bearers of the corporation. A trust may be validly created in the magistrates and council, without making the town, whose affairs they administer, any parties to that trust; and although for any breach of duty the magistrates themselves may be personally liable, their fellow-citizens, or the property belonging to the community at large, will not be responsible. It is otherwise when the duty is imposed on the burgh itself; but for any failure by the magistrates and council of a burgh, in the performance of a

(a) *Mersey Docks Trs. v. Gibbs*; *Police Comrs.*, 3 R. 535; *Foreman Id. v. Penhallow*, L. R. 1 H. L. 93. *v. Mayor of Canterbury*, L. R. 6 Q.

(b) *Virtue v. Comrs. of Police* B. 214.
Alloa, 1 R. 285; *Stephen v. Thurso*

duty imposed on them as magistrates and council, the common good is not answerable. Thus, when the Act 1633 was in force, the magistrates of towns were responsible for the town's share of the king's revenue; and the magistrates of Montrose, instead of stenting the inhabitants, arranged with the collector to let the matter stand over,—he himself meantime remitting the supply. In an action of relief, which was subsequently brought by the collector against the corporation, the Lords found the town and present magistrates not liable, but without prejudice to the pursuer to insist against the then magistrates, their heirs and executors (*a*). So, the Magistrates of Banff being pursued for the damage suffered by the pursuers through the negligence and wilful breach of duty of the former magistrates, in having refused to use any means to restrain a mob who, in the face of the sun, had carried off a valuable cargo of meal from the pursuer's ship in the harbour, the defence was sustained, "that there was no law making the magistrates, etc., of a town liable for the *delict* or negligence of persons formerly in the magistracy, and which ought only to affect those that were guilty" (*b*).

The same holds as regards a duty imposed by statute on a town council, not as representing the community or corporation of the burgh, but for behoof of a class or some particular interest in the burgh. In that event they are dealt with as trustees answerable personally at the instance of the beneficiaries for any negligence in the performance of the duty entrusted to them. Thus, when the impost called the Annuity Tax was levied in Edinburgh for behoof of the city clergy, and the magistrates, in breach of a duty imposed upon them by Act of Parliament, failed to appoint stent-masters for the collection of the tax, whereby, it was alleged, a large sum had been lost to the ministers, the House of Lords, affirming a judgment of the Court of Session, dismissed an action brought against the corporation to make good the loss. The remedy, it was decided, lay against the magistrates and town

(*a*) *Pearson v. Montrose*, M. 13,098.

(*b*) *Campbell v. Mags. of Banff*, M. 2504.

councillors in office when the failure to make the proper appointment occurred, who might be sued in their individual capacity, but their fellow-citizens could not be punished for their neglect (*a*).

2. At one time every royal burgh was bound to have a prison. The magistrates took charge of the prison; the jailor was their officer; but the responsibility for the safe custody of the prisoners rested on the burgh, which had to pay the debt out of its common good if the prisoners escaped. This was an example of a corporate obligation which existed down to the Act 2 & 3 Vict. c. 42, when it was abolished (*b*). Another instance which still exists is the duty imposed on the burgh to keep its streets free from pitfalls and dangerous obstructions. This obligation was enforced against the town where an injury was sustained from falling on a dark night into a hole made during repairs in the public thoroughfare, and imperfectly railed (*c*); and where a person, under similar circumstances, was injured by stumbling over a large stone lying on the pavement (*d*).

3. For injuries occurring through the defective state of places accessible to the public, the magistrates may, in some circumstances, be charged as proprietors of the ground for behoof of the community, and bound out of the common good to keep their property in a safe condition. In this their liability is just that of an ordinary proprietor; but it is strictly limited, of course, to those subjects which are actually held in property by the corporation. Thus, where a lad fell into a mill-lade, leading from the Burgh Mill of Stirling, the issue sent to the jury was, "Whether the deceased was drowned through the fault of the defenders in not having, as proprietors of the said Burgh Mill, and of the dam thereto pertaining, duly fenced the said dam?" (*e*).

(*a*) *Edin. Mins. v. Mags.*, 7 D. *Annan*, 8 D. 276; *Harris v. Mags.* 663, *affd.* 6 Bell's App. 509. *of Leith*, 8 R. 613.

(*b*) *Lamb v. Mags. of Jedburgh*, 3 (*d*) *Dargie v. Mags. of Forfar*, M. 1105. 17 D. 730.

(*c*) *Innes v. Mags. of Edin.*, (*e*) *Kerr v. Mags. of Stirling*, 21 M. 13,189; *Threshie v. Mags. of* D. 169.

Exercise of Statutory Powers.—No action lies for doing that which the Legislature has authorized, if it be done without negligence. The statute has made the operation lawful; and however much individuals may suffer in consequence of the exercise of the powers, it is *damnum absque injuria*, and must be submitted to for the public benefit without compensation, except in so far as the Act has appointed compensation to be given.

All such powers, however, are granted on the assumption that every care will be taken to do as little harm as possible to individuals; and therefore an action does lie for doing that which the Legislature has authorized, if it be done negligently. The promoters of the undertaking have no warrant to cause needless damage; and whenever it appears that by a more intelligent and reasonable exercise of the powers conferred by the statute, or which they possessed at common law, the damage could have been avoided, its occurrence is negligence within the meaning of the above rule (*a*). Thus, when a small-pox hospital was erected under the authority of a statute in a neighbourhood where it was found to be a nuisance, the House of Lords held that the defenders had been rightly interdicted from using the building for the purpose intended, seeing that there was nothing in the statute to compel them to erect it in that particular place and in that particular manner (*b*). Their Act, it was said, gave them no licence to commit a nuisance in any place which might be chosen for the purpose. Should the language of the Act be at all ambiguous on this point, the rule is to adopt that construction which most effectually carries out the object of the statute without doing injustice to private parties. If the work can be executed without injury to private rights, the grantee of the power is bound to do so (*c*). For example, authority to widen and cleanse a water-

(*a*) *Geddis v. Proprietors of Bann Reservoir*, L. R. 3 App. Ca. 430. (*b*) *Met. Asylum v. Hill*, L. R. 6 App. Ca. 193.

(*c*) *Biscoe v. G. E. Ry. Co.*, L. R. 16 Eq. 636.

course, was read as meaning that it should be deepened sufficiently to carry off all the water which might flow into it without overflowing the neighbouring land (*a*); and the same rule was applied in a case of a railway which had been built across certain burns and watercourses without providing a large enough outlet under the railway, in consequence of which the water, being unable to escape, overflowed and injured the lands on the higher side of the line (*b*). So, in a question between a gas company and a Local Authority as to the right of the latter to roll the streets with rollers which broke the pipes laid underneath, the Court held that since the company had been authorized by statute to place their pipes where they were, the defenders, in repairing the streets, were bound to use machinery of a lighter description (*c*).

The claim which arises in respect of the negligent use of parliamentary powers, differs essentially from the compensation which is assessed under the Lands Clauses Act, for the lands being injuriously affected by the lawful and proper exercise of the powers. There is here no question of negligence. The function of the assessing tribunal is that of a valuer called in to put a price on the land taken, and to calculate the detriment which, in consequence of the execution of the works, the rest of the estate has sustained as a marketable article.

Many eminent judges have interpreted the words "injuriously affected" in their popular sense, and as simply meaning deteriorated in value. In their view, in a railway compensation case under the statute, the claimant is entitled to receive the difference between the worth of the estate before and its worth after the railway was made; and probably this was what the authors of the Act intended. Unfortunately, however, the Court of Queen's Bench, when presided over by Lord Campbell, assigned to the word "injuriously" an artificial

(*a*) *Geddis, sup.*

(*c*) *Gas Light Co. v. St. Mary*

(*b*) *Potter v. Hamilton and Strath-* *Abbots, L. R. 15 Q. B. D. 1.*
aven Ry., 3 M. 83; Samuel v. Edin.
and Glas. Ry. Co., 13 D. 312.

meaning, and limited compensation to acts authorized in respect of which the right of action is taken away; and the decision (a) has since been followed in so many cases that it must now be regarded as settled law. Accordingly the claim is not sustainable under the Act unless it complies with the following conditions: *first*, the injury which the party has sustained must be an injury to land, or an interest in land; *second*, it must be a necessary consequence of the powers to which Parliament gave its sanction; *third*, it must have been actionable if there had been no Act; *fourth*, it must be due to the construction of the works, and not to the use of them after they are executed. The most important of these conditions is the last, and it was thus expressed in the latest case on the subject by the present Lord Chancellor: "It cannot now be doubted that a railway company, constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which Parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law" (b). Accordingly no compensation is payable for the discomfort and annoyance caused by the noise and smoke of trains (c) or vibration (d), the noise occasioned by a lighthouse fog signal (e), or the damage which may be caused by engine sparks (f), when the engine has been built with proper care to prevent the escape of sparks as far as possible. But where there is a physical interference with any right, public or private, available to the owner or occupier in making use of his property, there is a right of compensation, if thereby the property is lessened in value (g). Thus a property has a

(a) *Re Penny*, 7 E. & B. 660.

(b) *London & Brighton Ry. Co. v. Truman*, L. R. 11 App. Ca. 45, 50;
Rex v. Pease, 4 B. & Ad. 30.

(c) *City of Glasgow Union Ry. v. Hunter*, L. R. 2 H. L. (Sc.) 78.

(d) *Hammersmith Ry. Co. v. Brand*,
 L. R. 4 H. L. 171.

(e) *Nisbet Hamilton v. Comrs. of Northern Lighthouses*, 13 R. 710.

(f) *Vaughan v. Taff Valley Ry. Co.*, 29 L. J. Ex. 247.

(g) Per Thesiger, *arguendo*, adopted by Lord Hatherley in *Metropolitan Board of Works v. M'Carthy*, L. R. 7 H. L. 243, 261.

frontage to a navigable river, or faces a highway running along a river bank, and a work is executed which cuts off the access to the river; the property is deprived of an advantage which it formerly possessed, and the owner is entitled to compensation (*a*). Although this was denied by the House of Lords in an early case (*b*), that judgment has since been admitted to be erroneous, and it is now held that where access is gained to a private property by a public highway, or by a private road leading from a highway, the owner is entitled to compensation for an obstruction to his access by the erection of a bridge or other work over the highway, provided the obstruction is near enough specially to affect the value of his property (*c*). On the same ground compensation has been given for stopping up the one end of a street in which were premises used as an hotel and public-house, with the result that the custom was diminished by the interruption of the traffic (*d*).

One of the most important Local Government Acts is the Public Health Act of 1867 (30 & 31 Vict. c. 101). It provides (sec. 116) that full compensation shall be made out of any fund or assessment applicable to the purposes of the Act to all persons sustaining any damage by reason of the exercise of any powers of this Act, except when otherwise specially provided; and in case of dispute, if the sum claimed do not exceed the sum of £50, the same may be ascertained in a summary application by either party to the sheriff, whose decision shall be final; and if it exceeds £50, such compensation shall be ascertained and disposed of in terms of the Lands Clauses Act (*e*). The damage here meant is damage sanctioned by the Act, and not such as has arisen from the negligent execution of the Act. The assessment of damage of the latter character is the

(*a*) *Met. Board of Works v. M'Carthy*, *supra*. (*d*) *Wadham v. N.-E. Ry.*, L. R. 14 Q. B. D. 747.

(*b*) *Caled. Ry. Co. v. Ogilvy*, 2 Macq. 229. (*e*) *Peterhead Granite Co. v. Parochial Board of Peterhead*, 7 R. 538;

(*c*) *Caled. Ry. Co. v. Walker's Trs.*, L. R. 7 App. Ca. 259. *Macey v. Met. Board of Works*, 33 L. J. Ch. 377.

province of the ordinary courts of law, and as their jurisdiction is never excluded except by express words,—the special character of the tribunal called in to fix the damage, whose function, as we have said, is that of a mere valuer, is enough to put a limit on the damage to be recovered.

A duty imposed on a public body may found a claim of damages either on the ground of malfeasance or nonfeasance—either from the negligent way in which it is performed, or from their doing nothing at all, and refusing to perform it.

When it is of the nature of a ministerial act, to be done at the request and for the benefit of an individual, the body bound is obliged to perform it or pay the damage which may be caused by its non-performance. To revert to an illustration already given—a presbytery declining to receive a presentee who had been “vetoed” by the congregation, was held liable in damages (*a*); and since then it has been held that a minority who were willing to obey the law, may ignore the opposition of the majority, and proceed to act as if they were the presbytery (*b*). But in the general case, the duty which has been left unperformed relates to some public improvement which has been entrusted for execution to the local authority, in the mode which they may appoint. The construction applied to Acts of Parliament of this class is, that a power conferred on a public body for the public benefit, even where the words are permissive and enabling only, imports a duty. The Act has been passed that it may be acted on, and the body invested with the authority to put it in force is not entitled either to use the power or leave it unused, as they think proper. But the injury which may be occasioned by their inaction is an injury to the public interest, and there is no instance of an action having been sustained against a public board at the instance of a private individual, on the ground that by their failure to exercise their statutory powers he had lost a certain benefit which otherwise he would have gained. Were this competent, the other ratepayers, who probably may

(*a*) *Ferguson v. Kinnoull*, 1 Bell's App. 662.

(*b*) *Kinnoull v. Ferguson*, 5 D. 1010.

have suffered just as much as the complainer, would have to bear their own burden as well as his. Accordingly, in most of the recent statutes a specific remedy is provided for this form of official negligence, by making them amenable to the jurisdiction of the Court of Session, which may call them before it to answer for their conduct, and issue such order as may be proper. When, for instance, a parochial board refuses or neglects to do what is by law required of them, a petition may be presented by the Board of Supervision to the Court of Session, complaining of their conduct; and a similar power is possessed by the General Board of Lunacy, as against district boards, for carrying out the objects of the Lunacy Acts (*a*).

Public Companies.—A company is a collection of persons united together for some common object, generally the carrying on of some particular business by means of funds contributed by the individual members, which together constitute the capital of the company. The common law of Scotland recognises such a body as a separate entity capable of rights and obligations, yet differing from an ordinary partnership, in that the management is entrusted to certain persons, with defined powers, and each member is liable, not *in solidum* for the company's debts, but only to make good his subscription. It was accordingly held about the middle of last century (*b*), that the responsibility of shareholders in a joint-stock company trading under a descriptive name is limited to the amount of their shares in the company. In this case the company was neither constituted by statute nor by charter, but by private agreement amongst the members; it was provided "that nothing herein contained shall be understood to import a power to the directors, or any general meeting, to compel

(*a*) *Board of Supervision v. Old Id. v. Dull P. B.*, 17 D. 827; *Clark Monkland P. B.*, 7 R. 469; *Id. v. v. B. of S.*, 1 R. 261.

Galashiels, L. A. 12 S. L. R. 111; (*b*) *Stevenson v. M'Nair*, 3 Ross's *Id. v. Montrose*, L. A. 11 M. 170; L. C. C. 580.

Id. v. Pittenweem, L. A. 1 R. 1124;

any partner or subscriber to pay or contribute any more money to the stock than the sum by him subscribed." The decision in the case entitles us to assume that if the common law had been left by the Legislature to its own natural operation, corporations could have been lawfully established, in which the individual corporators would have been under limited liability, the creditor having recourse against the company as a separate *persona*, but beyond the capital and the assets belonging to it being without any other remedy. In the above case, however, it was overlooked that the association was struck at by the Bubble Act, which had been passed in the year 1719, to restrain the formation of the joint-stock companies, that had led to so many disasters in connection with the South Sea mania. This Act was not repealed until 1825, when the Statute 6 Geo. IV. cap. 91 was passed empowering the Crown, amongst other things, to grant charters of incorporation to bodies of individuals, and to provide (what previously the Crown was unable to declare) that the persons so incorporated should be personally answerable for the debts of the company. This legislation led to many evils. It checked enterprise; it prevented the application of capital to undertakings beyond the resources of private individuals, except on the footing that each should be liable to his last shilling and last acre; and the ruin of the concern might prove the ruin of many connected with it. At length the law was placed upon the existing footing by the Limited Liability Act of 1862.

The objects of this statute were (1) to facilitate the formation of public companies with a liability limited to the amount of their shares; (2) to define the relation between the directors and the general body of the shareholders, and to regulate other matters affecting the internal economy of the company, including the selling and assignment of their shares; (3) to provide a machinery for winding up the company in the event of bankruptcy, and making an equitable distribution of its assets.

A company, being a separate *persona*, acts through its

appropriate organs, the directors, in accordance with the will of the shareholders expressed in the articles of association or declared at a general meeting. Hence, when a member of an incorporated company enters into a contract with the company, he must be dealt with in respect of that contract as if he were a stranger; and if it inflicts a wrong on one of its shareholders, he has the same rights and remedies as any other person, with this difference, that he may have to contribute rateably with the others towards the payment of his own claim (a). To this there is one exception. A person who has been induced to join a company by misrepresentation can have no action for the deceit until he has ceased to be a member of it. His only remedy is *restitutio in integrum*; and if that is barred by lapse of time and acquiescence subsequent to his knowledge of the facts, or has been rendered impossible by the winding up of the company, his action of damages is irrelevant, and cannot be maintained (b).

Another consequence of the Act of Incorporation is that members are not individually responsible for acts done in their corporate capacity. The company, however, is always liable for a wrong committed by an agent acting within the scope of his business. Even when the agent has been guilty of malice or fraud in forwarding the interest of his employer, the latter is bound; and when the principal is an incorporated company acting through its directors, the liability is the same. It has accordingly been held that a corporation is liable in damages for the infringement of a patent by its servants, contrary to the orders of the directors; for false imprisonment (c), malicious persecution (d), assault (e), negligence (f), a libel (g), a nuisance (h), and an act of

(a) Per Lord Selborne in *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Ca. 317, 329.

(b) *Houldsworth*, *sup.*

(c) *Poulton v. L. & S.-W. Ry.*, L. R. 2 Q. B. 534.

(d) *Walker v. S.-E. Ry.*, L. R. 5 C. P. 640.

(e) *Eastern Counties Ry. Co. v. Broom*, 6 Ex. 314.

(f) *Scott v. Mayor of Manchester*, 1 H. & N. 59.

(g) *Whitfield v. S.-E. Ry.*, El. Bl. & El. 115.

(h) *Borough of Bathurst v. Macpherson*, L. R. 4 App. Ca. 256.

fraud (*a*). On the other hand, the corporation is capable of being hurt in its interests if not in its feelings: it may maintain an action for a libel calculated to injure the company, even when the author was one of its own shareholders (*b*), and obtain an interdict against its circulation (*c*), but not for a libel on the individual members of the corporation (*d*).

The principle on which these decisions rest is not peculiar to the law of injuries, but is founded on the general law of agency. The corporation is itself innocent, and is indeed incapable of any wrong feeling in the matter; but it acts through certain persons as its appointed organs, and malice, negligence, or fraud in them is in law the same, and is in strict technical pleading quite accurately described as the malice, negligence, or fraud of the company. The agent has probably no express authority to commit a fraud; possibly he may have been expressly enjoined to abstain from doing anything of the kind; but no one puts another in his place to do a certain class of acts, without undertaking to the public that he will be answerable for the manner in which the business is conducted; and it has been laid down that no "sensible distinction" can be drawn between the case of fraud and any other wrong. Thus, where a bank agent, by omitting a certain material fact from a statement made to A., fraudulently induced him to accept a bill in which the bank was interested, and which A. was afterwards compelled to pay, it was decided that A. should recover from the bank the amount so paid (*e*). In the application of the principle it is obviously of no moment whether the party is a corporation (acting *intra vires*) or a private individual.

Although a corporation cannot do anything except by its servants, it may be affected by the knowledge of a dangerous

(*a*) *Houldsworth v. City of Glasgow Bank, sup.*

(*b*) *Met. Omnibus Co. v. Hawkins*, 4 H. & N. 87.

(*c*) *Hill v. Hart Davies*, L. R. 21 Ch. D. 798.

(*d*) *Fleshers of Dumfries v. Rankine*, Dec. 10, 1816, F. C.

(*e*) *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C.

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and defective state of things in its premises, and is liable for a notice given or knowledge possessed by any person in a position of control. Where the question was whether a company was affected by the knowledge of the mischievous propensity of a dangerous dog, it was found not to be enough to prove that it was known to some of the men who had the care of several horses; but it was said that if it could be brought home to any person who had control of the business, or of the yard where the dog was kept, and whose duty it would be to inform the company of what the dog had done, the evidence was sufficient to infer liability (*a*).

Partners.—It follows from the doctrine of agency, to which we have already referred, that an ordinary partnership is liable in damages for the negligence of any one of its members in the conduct of the business of the firm. Thus the two proprietors of a stage-coach were held liable, along with the third, for the negligence of the latter in driving the coach (*b*); and the proprietors of a coal-pit were jointly answerable for not keeping the shaft in order, although one of them only superintended it (*c*). As a rule, the wilful malicious act of one partner is not imputable to the firm. If, for example, a person is prosecuted maliciously for behoof of the firm for stealing partnership property, the firm is not answerable, unless all the partners were in fact privy to it (*d*); but when injury is caused by the negligence of a partner when engaged in the business of the partnership, the claim lies against the firm.

Bankrupt.—By sequestration a bankrupt is divested of his entire estate, including claims of damages where only a question of money is involved (*e*). But when the interest is mainly personal to the bankrupt,—as in a case of assault

(*a*) *Stiles v. Cardiff Iron Co.*, 437; *Ashworth v. Stanwix & Walker*, 33 L. J. Q. B. 310. 30 L. J. Q. B. 183.

(*b*) *Moreton v. Hardern*, 4 B. & (d) *Arbuckle v. Taylor*, 3 Dow 160.
C. 223. (e) *Thom v. Bridges & M^cQueen*,

(*c*) *Mellors v. Shaw*, 1 B. & Sm. 19 D. 721.

or defamation, in which the question is one of feeling,—it is not clear that this right to sue passes to the trustee (*a*). If the trustee refuses to come forward, the bankrupt has always a good title to sue, subject to the condition of finding caution for expenses, which the Court will deal with in its discretion (*b*). But when the verdict is obtained, and the pursuer's character is vindicated, the personal element vanishes, and the trustee is entitled to claim the damages for division amongst the creditors as part of the bankrupt estate (*c*).

Statutory Limitations.—In many Acts of Parliament a clause is inserted forbidding an action of damages to be brought for anything done, or intended to be done, in the execution of the Act except on certain conditions. These clauses are differently expressed; but the following, which is the form in which the provision appears in the Poor Law Act, may be taken as an example:—

“All actions on account of anything done in the execution of this Act shall be brought before the Sheriff Court, and every such action shall be commenced within three calendar months after the fact committed; and notice in writing of such action, and of the cause thereof, shall be given to the defender one calendar month at least before the commencement of the action.”

Provisions of this kind are intended for the protection of the officers and members of public boards, who, when engaged in the execution of the Act, unintentionally and through some mistake of fact or law, do something which the statute does not authorize. They cover such a mistake as was made by a collector of the poor's assessment in making up the roll of defaulters, when, instead of charging a firm for the whole

(*a*) “I can quite well conceive, at all events, that there may be demands so personal in their character that they would not pass to the trustee,” per Lord Moncreiff in *Jackson v. M'Kechnie*, 3 R. 130, 133.

(*b*) *Buchanan v. Stevenson*, 8 R. 220; *Ritchie v. M'Intosh*, 8 R. 747; *Clarke v. Muller*, 11 R. 418; *Scott v. Johnston*, 12 R. 1022; *Collier v. Ritchie*, 12 R. 47.

(*c*) *Jackson v. M'Kechnie*, *sup.*

assessment, he entered the two partners, whose rates were unpaid, as each individually liable for the one-half. The diligence having been found to be illegal, he was held to be protected from an action of damages (*a*). So, when the name of a person not resident in the parish was erroneously included in the roll of persons liable in poor-rates, the inspector of the poor and the members of the parochial board were held entitled, in answer to an action of damages, to found on the clause in question (*b*). In such cases as these there is no question of the *bona fides* of the official. He fully believed that what he did was warranted by the Act, but he made a mistake: in the one case, a mistake in fact; in the other, a mistake in law; and for such mistakes it is reasonable that the right to sue for damages should be subjected to a certain limitation. When, however, the officer acts wantonly, as, for instance, when a member of the house committee of a parochial board committed an assault on one of the inmates of the poorhouse when he was paying an official visit, it was held that he had no protection; for on no possible view which could be taken of his visitorial powers could he have believed that he was carrying out the Act in laying violent hands on one of the paupers (*c*).

It is obvious also that the clause cannot be pleaded as a bar to any kind of action but one of damages for illegal acts. It does not apply to proceedings taken for the enforcement of a contract (*d*); for a declarator regarding the tenure of the office of governor of the poorhouse; for the assessment of compensation for lands taken or injuriously affected (*e*); and it has no application to a contractor under the board (*f*).

(*a*) *Ferguson v. M'Ewen*, 14 D. 457.

(*b*) *M'Laren v. Steele*, 20 D. 48.

(*c*) *Knox v. Macarthur*, 3 M. 890.

(*d*) *Mackay v. Beattie*, 22 D. 1486.

(*e*) *Delany v. Met. Bd. of Works*, L. R. 2 C. P. 532.

(*f*) *Stringer v. Barker*, W. N. 1879.

Reference may here be made to some protective provisions of a similar nature in other Acts.

Road Acts.—A trustee, or member of a board, or district committee, is not to be personally liable; and the trustees may apply any monies from time to time coming into their hands for the purpose of paying legal expenses, or any damages they

may incur in the *bona fide* execution of the powers granted by the Act. 41 & 42 Vict. c. 51, § 110.

Proceedings in Lunacy.—Actions against medical men for certificates granted by them under the Lunacy Acts to be tried before the Lord Ordinary without a jury, and to be brought within twelve months of the lunatic's liberation from the asylum. 29 & 30 Vict. c. 51, § 24.

Licensing Statutes.—Every action against any sheriff, justice, magistrate, procurator-fiscal, constable, etc., for anything done in execution of the Acts passed for the regulation

of public-houses in Scotland, must be commenced within two months after the cause of action or prosecution shall have arisen. 9 Geo. IV. c. 58; 16 & 17 Vict. c. 67; 25 & 26 Vict. c. 35.

Actions against *Excise* officers for illegal seizure, etc., 7 & 8 Geo. IV. c. 53, § 114–118; effect of certificate of probable cause, *ib.* § 119.

Customs.—Actions against officers of army, navy, customs, etc.; evidence, limitation of time, etc. 39 & 40 Vict. c. 36, § 268–272; 40 & 41 Vict. c. 13, § 4.

CHAPTER IV.

THE CHURCH AND THE CIVIL LAW.

The Established Church.—A person complaining of the judgment of a church court as illegal, must exhaust the remedies which the Church itself provides before coming to the Civil Court for redress (*a*). If the delinquent body is a kirk-session, he may appeal to the presbytery, thence to the Synod, and finally to the General Assembly; and until he has gone through them all, there is no room for civil interference. Further, the Civil Court never reviews an ecclesiastical sentence on the merits. The courts of the Established Church belong to the recognised judicatures of the realm, and within their own proper sphere their authority rests on the same statutory foundation as the authority of the Civil Court itself. The judges of the Court of Session might as well attempt to review the judgment of the High Court of Justiciary on the relevancy of a criminal charge, as of the General Assembly on a question of heresy, discipline, or morals. In this country it appeared in former times to be wise that spiritual matters should be separately managed from secular affairs by courts which were to be practically independent of the Civil Court. These courts have their own forms of process, and their own rules of procedure. The ecclesiastical authority which makes them is necessarily the proper authority to interpret them; and the Court has uniformly refused to interfere with an ecclesiastical trial, or the sentence by which it was followed. It has refused to do so, when the application was founded on the alleged irrelevancy of the libel, the insufficiency of the instance, the improper

(*e*) *Lang v. Presby. of Irvine*, 2 M. 823.

rejection of evidence (*a*), the insanity of the accused (*b*), the fact that he had already "tholed an assize" (*c*), and that the proceedings were defective, irregular, and oppressive. These are all matters for the ecclesiastical court to deal with; and one dissatisfied with the judgment may carry the case to the Synod or General Assembly, either of which, it must be presumed, will give the appropriate redress. In this last case Lord Justice-Clerk Moncreiff said, "Within their spiritual province the church courts are as supreme as we are within the civil; and as this is a matter relating to the discipline of the Church, and solely within the cognizance of the church courts, I think we have no power whatever to interfere" (*d*).

The cases which led to the schism in the National Church in 1843 arose out of a conflict between the civil and ecclesiastical courts on the question whether, in the administration of the Act of Queen Anne on the subject of patronage, the Church had not overstepped its province. But as the Act is now repealed, and no such question can ever again occur, it is needless to refer further to a controversy which has ceased to possess any legal interest. In matters properly ecclesiastical, however, the Church has always been regarded as independent of the civil power. Thus, in 1781, we find an action for defamation and damages brought in the Court of Session by two parishioners of Abernethy against Mr. Grant, the minister, for refusing to give the pursuers tokens for admission to the Sacrament. The Lord Ordinary, although he expressed his disapprobation of the conduct of the defender, which arose out of a proceeding before himself, as Judge of Justiciary, held that as by that refusal he was acting in his capacity of minister of Abernethy, he was not amenable to the Civil Court, and he was accordingly assoilzied from the action. This interlocutor was adhered to by the Court; but the

(*a*) *Lockhart v. Presby. of Deer*,
13 D. 1296.

(*c*) *Wight v. Presby. of Dunkeld*,
8 M. 921.

(*b*) *Paterson v. Presby. of Dunbar*,
23 D. 720.

(*d*) *Ibid.*, 925.

pursuers having amended their libel, and offered to prove that the defender had said to many persons that the pursuers had perjured themselves before the Justiciary Court, the Court held that these facts, which were not within the scope of Mr. Grant's ecclesiastical character, were injurious and actionable (a). A similar judgment was pronounced by Lord Hailes in *Robertson v. Preston*, 11 Aug. 1780 (b), and unanimously adhered to by the Court, refusing a proof of what was said or done in the kirk-session in their collective capacity, but allowing a proof of what they did as individuals (c).

In the ecclesiastical courts an accusation begins with a *fama clamosa*, which is investigated by the Presbytery, and the accused is not put on his trial unless the preliminary inquiry discloses a *probabilis causa*. Whatever be the result of the proceeding, no action of damages will lie against the Presbytery or other judicature with which it originates; because the court in its corporate character is incapable of malice or motive; and the redress, if any, must be obtained from the individuals of which it is composed. Of this distinction, Lord Bramwell recently furnished this illustration. "If" (he said) "the whole body of shareholders were to meet and in so many words to say, 'prosecute so-and-so, not because we believe him guilty, but because it would be for our interest to do it,' no action would lie against the corporation, though it would lie against the shareholders who had given such an unbecoming order" (d). Some such consideration—although it is not distinctly expressed in the judgment—appears to have influenced the decision in *Sturrock v. Greig* (e), which was a claim of damages by a schoolmaster who had been accused by a kirk-session of certain scandals of which he had been acquitted by the Presbytery, and which he now alleged were not only groundless but malicious. It was

(a) *M'Queen v. Grant*, M. 7466,
7468.

(b) M. 7468.

(c) *Kidd v. Paterson*, 12 Feb. 1808;
Borth. on Libel, 391.

(d) *Abrath v. North-Eastern Ry.
Co.*, L. R. 11 App. Ca. 247, 251.

(e) 11 D. 1220.

laid down that no action of damages will lie against a church court of the Established Church for any sentence or judgment pronounced by them on a proper case of discipline duly brought before them, regularly conducted, and within their competency and province as a church court; and it was observed, "that any inquiry into its *motives* by the Civil Court is absolutely repugnant to the freedom which must belong to a church in matters of discipline."

This, however, does not exempt a member of the court from individual responsibility for his conduct in the exercise of his office. He is entitled to the ordinary presumption that he intended to act honestly; but the presumption may be rebutted; and if it can be shown that he used his place for the gratification of his personal malice by insisting in charges which were false and unfounded, he must answer for his misconduct like any other individual. He has no judicial privilege,—which is peculiar to secular judges. Indeed, it has been observed that the fact of his being a member of a church court, so far from being a justification, is an aggravation of a false accusation dishonestly made (*a*).

It is competent for a sheriff, as judge ordinary, on the application of a presbytery or other recognised judicature of the Established Church, to issue letters of first and second diligence against witnesses neglecting or refusing to attend on the citation of the church court to give evidence in any competent proceeding before it (*b*).

Dissenting Churches.—A Church not established is in the view of the law a voluntary association—not a partnership whose object is gain, and in which each member of the firm is the hand of the rest—nor a club in which the members subscribe to a common fund to be managed by

(*a*) See *M'Lean v. Fraser*, 3 Mur. 353 (slander at a meeting of presbytery); *Mathers v. Laurie*, 12 D. 433; *Edwards v. Begbie*, 12 D. 1134; *Rankin v. Simpson*, 21 D. 1057; *Henderson v. Henderson*, 17 D. 348; *Dunbar v. Skinner*, 11 D. 945. (*b*) *Presbytery of Lews v. Fraser*, 1 R. 888.

a committee, but incur no further liability without their consent;—but a religious fellowship in a lawfully organized form—permanent in character, and meant to be independent of secular authority. Like every other society, however,—corporate or unincorporate,—a Church is under the law; and the two points in which it may come into conflict with the Civil Court are: (1) the exercise of discipline over its members; (2) disputed questions with respect to its property.

With regard to the first, the unbroken current of judicial authority, from the earliest appearance of dissent in Scotland, has been to leave the Church the utmost liberty. The first secession from the Established Church occurred in the year 1733. And in 1792 there arose the case of *Auchincloss v. Black (a)*. Auchincloss was a Burgher minister who was deposed for immorality by the Presbytery—partly on proof and partly on his own confession. The sentence having been confirmed by the Synod, he brought an action of damages against eight members of the Presbytery, alleging that they had joined in a conspiracy to ruin him, and had wrung his confession from him when he was in a weak state of health and spirits, “by threats and false promises.” The defenders were assolizied, but the Court observed that a charge made against a Dissenting minister, although made in a judicial form before his ecclesiastical superiors, would be actionable “if truly a calumny and made and prosecuted in a malicious spirit.” The exemption of such Churches from civil jurisdiction was reaffirmed in the case of *Grieve v. Smith* in 1808 (*b*), where a member of the sect called Bereans, who discussed the faults of the brethren in the presence of the whole congregation, was found to have no action of damages against a brother member for preferring an accusation of dishonesty against him while in his employment, in order that it might be judicially dealt with in accordance with the rules of the Society. The defenders, it was held, were not liable for anything which had passed judicially in some measure at the meetings of the con-

(a) Hume 595.

(b) Hume 637.

gregation, according to the rules and usages of the Berean Society. To the same effect is the case of *Edwards v. Begbie* in 1850 (*a*), where the ground of action was a sentence of expulsion pronounced by the vestry of an Episcopalian congregation, which had been reversed by the bishop on the ground that the accused had received imperfect and insufficient notice, contrary to the constitution of the chapel. It was admitted that the vestry had an undoubted right to expel a member for cause, and the Lord Ordinary held that they were not responsible even for errors in the exercise of their duty if they themselves had been honest and in *bona fide*. The pursuer offered to put malice in issue; and the defenders, after unsuccessfully declining the jurisdiction of the Court altogether, proposed that instead of the words "maliciously and without probable cause," the issue should run—"Whether the acts complained of were done by them in violation of their duty as vestrymen;" and with the consent of the pursuer this was agreed to.

The principles which underlie these judgments do not seem to differ from the principles which have been twice laid down by the Privy Council in two important cases, and which were thus expressed:—

"(1.) The members of any religious body, other than the Church established by law, may adopt rules for enforcing discipline within their body which will be binding on those who expressly, or by implication, have assented to them.

"(2.) Where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice.

"(3.) In such cases the tribunals so constituted are not in

any sense courts. They derive no authority from the Crown; they have no power of their own to enforce their sentences; they must apply for that purpose to the Courts established by law, and such Courts will give effect to their decision as they give effect to the decisions of arbitrators, whose jurisdiction rests entirely on the agreement of parties" (a).

Whether a Dissenting Church is entitled to invoke the aid of the Civil Court to enforce the attendance of witnesses, as one of the judicatures of the Established Church may do, has never been decided. But it was the opinion of Lord Ardmillan that such aid ought to be given when craved, if required to assist the exercise of a jurisdiction voluntarily constituted. The Civil Court, he observed, was in use to compel a witness to attend and depone before an arbiter; and he thought the principle was the same. The other judges would give no opinion on this point; but the Judicial Committee, in the passage above cited, evidently considered the claim well founded, if a proper occasion arose for its exercise; and it has been held that a person cited to give evidence, if not entitled to the privileges of a witness, may claim a certain measure of protection both as regards his statements in proof and under precognition (b).

The principles contained in the judgment of the Judicial Committee above cited are specially applicable to a Church which has adopted the Presbyterian polity. Under that system the General Assembly, as the supreme authority within the communion, is invested with legislative, executive, and judicial powers. It has the inherent right to interpret its own standards, to enact its own form of process, and to settle all points of procedure; and its decisions are final on all questions relating to doctrine, discipline, or ecclesiastical rule.

It is only, however, by slow degrees that it has come to be recognised that a Church differs essentially from every other

(a) *Long v. Bishop of Cape Town*, Williams, L. R. 7 App. Ca. 484, 1 Moo. P. C. N. S. 411; *Merriman v.* 502.

(b) *Gibb v. Barron*, 21 D. 1099.

relationship resting on contract. Even so recently as the *Cardross* case this was referred to as not beyond controversy. The facts of this case were as follows:—A Free Church minister was suspended from the ministry by the General Assembly, certain charges—which the Presbytery found partially proved, and the Synod not proved—being in the opinion of the Assembly all proved. The accused brought a suspension of the sentence, on the allegation that the Assembly had exceeded its powers in dealing with the whole case *ab initio*, when the propriety of the Synod's reversal of the Presbytery's finding was the only question before it. As soon as the suspension was served, the General Assembly summarily deposed him for appealing to the civil power. He then raised an action of reduction and damages against the Assembly, and certain of its members, claiming that both sentences—suspension and deposition—were null, and although the Civil Court could not reinstate him in the office of the ministry, they could at least compensate him for the clerical offices of which he had been unjustly deprived, and the injury he had otherwise suffered. It will be observed that he did not allege that the acts of which he was accused (drunkenness and scandalous familiarity with a married woman) were not the subject of ecclesiastical censure, that the libel was irrelevantly laid, or that he was not subject to the jurisdiction of the Presbytery which tried him in the first instance. But the questions raised were:—

First, the matter having been judged of by the Presbytery, carried by appeal to the Synod, at the pursuer's instance, and thence to the Assembly, by appeal at the Presbytery's instance, could the Assembly do more than reverse the Synod's deliverance in the pursuer's favour, and reaffirm the original finding of the Presbytery? And, second, was it a rule of the Free Church that a minister who complains to the Civil Court, as the pursuer did, of an ecclesiastical sentence, which he conceives to have been incompetently pronounced, becomes liable to instant deposition (*a*)?

(*a*) *M'Millan v. Free Church*, 23 D. 1343, 24 D. 1282.

The final judgment left these questions of fact undetermined; but it was laid down in the broadest terms, that so long as the church court is honestly seeking to do its duty in performance of the functions imposed upon it, no allegation of error, irregularity, violation of contract, non-observance of the constitutional rules and practice of the Church—such as those above suggested—will open the door to civil redress. No mere error of judgment on the part of an arbiter, or a committee, a Synod, or General Assembly, trying to act justly between the parties before them, will ever expose them to a claim of damages. “Infallibility” (said Lord Curriehill) “is attainable by no man, however laboriously and conscientiously he may exert his powers to do what is right.” He was therefore of opinion that so long as a member of a Church Court could not be said to have acted maliciously and without probable cause, he was not responsible for any errors into which he might accidentally fall (*a*).

(*a*) The following summary of the legal results of the *Cardross* case was prepared by Mr. Murray Dunlop, and has been published in Sir H. Moncreiff's *Vindication of the F. C. Claim of Right*, p. 295:—

“So far as in favour of the Church, it has been determined:

“1st. (By the Lord Ordinary, acquiesced in by the pursuer, and mentioned with approval by the Court) That a suspension and interdict to stay the proceedings of the General Assembly in a case of discipline, and to interdict their sentence from being carried into effect, is incompetent.

“2nd. (By the Court in the final disposal of the first actions) That an action concluding for damages against a Church judicatory as such, and its officers as representing it, is incompetent.

“3rd. (By the Court on the same occasion) That in an action of damages against individual members

of a Church judicatory, for proceedings in a case of discipline in reference to one of its ministers, the pursuer cannot competently insist on his claim of damages without taking an issue of malice and want of probable cause.

“4th. (Also by the Court on that occasion) That an action for reduction of a sentence of suspension or deposition, and for being restored thereagainst, standing alone, and not followed in the summons by conclusions for civil reparation, is incompetent.

“5th. (Opinion stated unanimously on the same occasion) That even when so followed by such conclusions, the reduction is incompetent to any further extent or effect than to admit of, or secure such, civil reparation, but not to the extent of affecting ministerial status.

“6th. (By the Lord Ordinary in the new action, with a reclaiming

When a sentence has been pronounced by the competent authority in the Church, the Court has uniformly refused to go behind it for the purpose of inquiring whether on the merits it was well founded or not. This was the second point decided in the case of *Auchincloss* already mentioned. After he had been deposed from the ministry, a section of the congregation declined to leave him; and, supported by them, he refused to give up the church. A petition was then presented by the other party in the congregation to the sheriff, praying that the minister should be ordained to give up the keys, and remove from the manse, glebe, and pertinents. The sheriff refused the petition: the case was advocated to the Court of Session; and in a subsequent declarator, which was brought by Auchincloss, Lord Justice-Clerk Braxfield pronounced the following judgment: "In respect the Lord Ordinary does not consider it competent for this Court to review the decisions of Associate congregations, commonly called Burghers, when sentences are pronounced by them in their ecclesiastical character, therefore sustain the defence," etc. The Court adhered on advising petition and answers, and Auchincloss thereupon abandoned the meeting-house (a).

It is a more difficult question how far the Church judicature may competently modify or alter the Church standards, so as to bind a protesting minority. It is admitted, of course, that it is only when the resolution passed touches some civil interest that the Civil Court can entertain the question at all. When a clergyman of the Scottish Episcopal Church complained that the new canons which were enacted by that body in 1863 were essentially different from the canons of 1838, under which he had been ordained and accepted office in the Church, Lord Cranworth said that his remedy was not

note lodged, but subsequently abandoned) That a non-established religious communion has no such civil or corporate existence as to

make it liable to be called as a party before a Court of law."

(a) *Ex relatione* Lord Meadowbank in *Gallbraith v. Smith*, 15 S. 808, at p. 821.

to reduce the canons as illegal, but to leave the Church with which he was no longer in agreement. If his membership entitled him to some pecuniary benefit,—the use of a house or land, the right to occupy a chapel or a school,—this would impose on the Court the duty of inquiring into the regularity of the action of the association. But without this, no dissentient member was entitled to come to the Civil Court for redress against a decision by its judicatures of which he disapproved (*a*).

When, in the event of a “split” in the religious body, an appeal is made to the civil power to decide which party is entitled to the property, it is evident that the question must depend on the inquiry, What are the trusts on which it is held? If the fund or the building which is in controversy is dedicated to the maintenance of some specific form of religious belief—or doctrine, or ritual, or church government—it becomes the duty of the Court—as in the case of any trust—to see that it is not diverted from the specified purpose to some other and different object. That the trustee happens to be a religious body, is of no consequence; the point to be decided is, Which of the parties is seeking to violate the trust, and defeat the declared object of the testator? and no section of the Church, however preponderant in numbers or influence, will be allowed, from a change of views, to carry off the property confided to them for the support of one form of religious opinion, to the maintenance and spread of doctrines quite different.

But in most cases the trust is not so expressed. The property has been acquired by purchase or donation “for the use” of the Church, using its descriptive name, and nothing is said about principles, except for the identification of the donee. In such an event, it was the opinion of Lord Eldon (*b*)

(*a*) *Forbes v. Eden*, 5 M. 6, 51, H. L. 3. case, *Couper v. Burn*, 22 D. 120; the *Campbeltown* case, *Galbraith v.*

(*b*) The *Craigdallie* case, *Craigdallie v. Aikman*, 1 Dow, 1, 2 Bligh, 529; the *Kirkintilloch* case, *Craigie v. Marshall*, 12 D. 523; the *Thurso* case, *Smith*, 15 S. 808; *Broom v. Summers*, 11 Sim. 353; *Att.-Gen. v. Ansh*, 13 L. T. N. S. 235; *Att.-Gen. v. Gould*, 28 Beav. 485.

that numbers ought not to decide; nor which party adhered to the supreme authority in the Church, but which of them adhered to the principles on which the society was originally formed. The doctrine, however, is open to serious question. It has since been condemned by the Supreme Court of the United States as legally untenable, and it is apprehended that whenever a question arises in the religious body itself with reference to any point of doctrine, the decision must rest with the supreme judicature to which, under its constitution, the settlement of such matters is entrusted; and if there is no such authority, the majority of the congregation must rule. When there is no express trust impressed on the property, there is no reason why one should be implied to enable a seceding minority to overrule the majority, and possibly destroy the Church altogether. It was apparently on this principle that the Court acted in *Connell v. Ferguson (a)*, when, on the occasion of a schism in a Congregational Church in Glasgow, they sustained the action of a majority in expelling some members who claimed to represent "the Church," and alleged unsuccessfully "aberration" (as Lord Neaves called it) on the part of their opponents. As to the propriety of thus dealing with the question, the Supreme Court of the United States has forcibly observed:—

"In this class of cases we think the rule of action which should govern the Civil Courts, founded on a broad and sound view of the relation of Church and State under our system of laws, and supported by a preponderating weight of judicial authority, is, that whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these Church judicatories, to which the matter has been carried, the legal tribunals must accept such decisions as final and binding on them, in their application to the case before them. . . . The right to organize voluntary religious associations, to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the

association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body, do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such bodies, if any one aggrieved by one of their decisions could appeal to the secular Courts and have them reversed" (a).

(a) *Watson v. Jones*, 13 Wall 679, 727, 728.

CHAPTER V.

TRESPASS TO PERSON AND PROPERTY.

To maintain an action for an injury to the person, the injurious act must be either wilful or the result of negligence. In our old law, the reparation due to the next of kin of a person slain was termed assythment,—an expression still occasionally used, but more properly employed in the sense of blood money,—the compensation paid by one who has taken the life of another when the homicide was not accidental. The amount was fixed either by the Court of Justiciary on the trial of the delinquent, or by the Court of Session under a remit from the criminal Court; and the right to claim it appears to have been coextensive with the right to prosecute *in pœnam* (a). In murder, when the murderer was hanged, the claim was held to be absorbed in the satisfaction offered to public justice; and unless the act could be prosecuted as a crime, there is no authority for holding that the person who committed it was liable in a proper assythment.

No instance has been found of such an action being raised by a relation outside of the direct line, and (subject to the same limitation) the action is now superseded by the ordinary action of damages. Such an action is not founded on any right vested in the deceased and transmitted to his representatives. The pursuers sue for solatium and the recovery of any loss they may have sustained; and between husband and

(a) Lord Kames' view is that it was the remains of a barbarous usage before the full establishment of public justice, when the criminal bought off the relatives of the deceased and redeemed his blood. Law Tracts, i.

wife, and ascendants and descendants, there is no doubt of their title. To a brother or sister, however, action has been denied, even where they alleged a direct pecuniary interest on the ground that they were wholly dependent on him (*a*). The reason of the distinction appears to be a desire to confine the action to those who were marked out from other relations by being under a mutual obligation of support, and whose sense of bereavement may be supposed to be more acute (*b*).

Assault.—The damages which may be claimed for an assault are not merely for the suffering occasioned, but the affront and insult which it involves. In some forms of assault, such as throwing a bucket of water on a man, or spitting in his face, the latter element far exceeds the bodily hurt resulting from the encounter.

The issue raised is, whether at a certain place, on a day named, the defender assaulted the pursuer (*c*),—a form which leaves to the judge the duty of explaining to the jury what in law constitutes an assault. It is not necessary that the person should be struck, it is enough that he be struck at; for the offence essentially consists in the intention, coupled with the present ability, to inflict personal violence on another. It is the threat of the use of force to the person of another, in such a manner as to cause that other to believe, on reasonable grounds, that he is capable of effecting his purpose, which constitutes the offence. But acts which in them-

(*a*) *Eisten v. N. B. Ry. Co.*, 8 M. 192; *Leith-hall v. Fife*, M. 13,904, 980; *Greenhorn v. Addie*, 17 D. Hailes 206; *Stewart v. Storie*, Br. Sup. v. 646; *Macdonell v. Macdonald*, 2 Dow 56.

(*b*) On the subject of assyhtment, see *Forrest v. Clerkington*, M. 13,903; *Guild v. Home*, M. 13,903; *Drew v. Horne*, M. 13,904; *Niddrie v. Boyd* (assyhtment for mutilation), Br. Sup. i. 479; *Deniston v. Smith*, Br. Sup. iv. 426; *Moodie v. Stewart*, Br. Sup. v. 709; *Machargs v. Campbell* (culprit found guilty by court-martial but unhanged), M. 12,541, Hailes 192; *Leith-hall v. Fife*, M. 13,904, 980; *Greenhorn v. Addie*, 17 D. Hailes 206; *Stewart v. Storie*, Br. Sup. v. 646; *Macdonell v. Macdonald*, 2 Dow 56.

(*c*) All particulars of the assault are now struck out, *M'Laren v. Robertson*, 21 D. 183. For other examples, see *Lang v. Lillie*, 4 Mur. 82; *Ball v. Longlands*, 12 S. 934; *Gordon v. Stewart*, 5 D. 8; *Anderson v. Barr & Cavens*, 9 D. 929; *Muckarsie v. Dickson*, 11 D. 4; *Ewing v. E. of Mar*, 14 D. 314.

selves might constitute an assault, may be so explained as to show that no harm was intended, as when one interferes in a fray for the purpose of preventing further mischief, or does an injury accidentally to some helpless person whom he is trying to assist. It was held to be no bar to an action for assault that it was committed abroad, and that by the law of the place no civil damages would be awarded until a conviction had been obtained before the criminal Court (*a*).

A man may be guilty of an assault (at least civilly) which is committed by the hands of another. When an omnibus conductor removed a passenger, under the false idea that he was drunk, the employer was held liable for the assault; for, as the Court said, the master, by giving his servant authority to remove an offensive passenger, necessarily gives him authority to determine whether any passenger had misconducted himself (*b*).

Where a passenger was provided with a ticket which entitled him to travel to the place he wanted to go to, but not with the train by which he wished to travel, the Court found that, on his refusing to get out of the carriage, or pay for a proper ticket, he was properly removed by the railway officials, and that the Company was not liable in damages as for an assault (*c*). But in this case the action of the Company's servants was justified by the terms of a bye-law. At common law the Company's only remedy—when a passenger, lawfully in the carriage, is unable to produce his ticket, having lost it—is not to eject him, but to proceed by action (*d*).

In such cases as these the Company is responsible—for the assault (if an assault) is necessarily committed by the servant in the performance of his duties. But no one is liable for the tortuous acts of another, if they go beyond

(*a*) *Scott v. Seymour*, 32 L. J. Ex. 61. *way Co.*, 10 R. 344 (passenger ejected and given into custody who had failed to get his ticket stamped, contrary to rules).

(*b*) *Seymour v. Greenwood*, 7 H. & N. 355, 30 L. J. Ex. 327.

(*c*) *Menzies v. Highland Railway Co.*, 5 R. 887; *Apthorpe v. Ed. Tram-*

(*d*) *Butler v. M. Shef. & Linc. Ry. Co.*, 4 T. L. R. 607.

the scope of the duty entrusted to him. For instance, a candidate at an election is not answerable for the uproarious conduct of his supporters (*a*); nor is the chairman of a meeting answerable for an assault committed on a person who was ejected for causing a disturbance; for between the chairman of a meeting and the stewards and other persons appointed to keep order, the relation of master and servant does not subsist, and to make the chairman liable for the trespass he must have personally given the order for it (*b*).

Accidents occurring in a trial of strength and in games of skill are not actionable. Two persons wrestling with each other in sport are held to take the chance of accident, and so long as the sport is fairly conducted, and no excessive force is used, neither of them has any claim against the other (*c*); but if any injury by misadventure be inflicted upon a bystander, as in a sportive attempt to make him join in the game, and he is injured, compensation is due (*d*).

It may also be observed, that although games such as boxing and wrestling are lawful, prize-fighting is not,—for the former is not expected to be attended with any appreciable harm, but in the latter the object is to cause it; and wherever two persons go out to strike each other, and do so, each is guilty of assault. Sending a challenge to fight (*e*), or “posting” one for refusing to fight (*f*), is also relevant to infer damages.

The offence is also committed although the person be not struck at all, but only struck at, he being within reach. When the fist is held out in a threatening manner at some one near enough to receive the blow,—when a gun or pistol, loaded or unloaded, is presented at another within range,—in fact, any gesture or threat of violence, with the means of carrying it into effect, is an assault, although the threat is not

(*a*) *Peacock v. Young*, 21 L. T. 527.

(*d*) *Reid v. Mitchell*, 12 R. 1129.

(*b*) *Lucas v. Mason*, L. R. 10 Ex. 251.

(*e*) *Armstrong v. Vair*, 3 Mur. 315,

(*c*) *Christopherson v. Bare*, 11 Q. B. 473.

(*f*) *Menzies v. Goodlet*, 13 S. 1136; *Russel v. Shirreffs*, 15 S. 881; *Mackay v. Campbell*, 11 S. 1031.

fully accomplished (*a*). The parties, however, must be near enough to make its accomplishment possible (*b*). In these cases intention is a matter of importance in the inquiry, for words of menace may be used in circumstances which exclude the idea that anything serious was intended. "If it were not assize time, I would not take such language from you," said a man, putting his hand to his sword, and this was held to be nothing but a threat, and no assault (*c*); but when the defender and some of his workmen mustered round the plaintiff, tucked their sleeves, and threatened to break his neck if he did not go out of the premises, this was an assault, although no violence was really inflicted (*d*). If two persons are both *versantes in illicito*, e.g. riding furiously along the road, the one is liable for all the harm done by the other (*e*).

The defences which may be stated to this action are, (1) self-defence. A man, when attacked, should be at liberty to defend himself; and it is enough to say, that using no more violence than was necessary, he was acting in protecting his person, his family, or his property from trespass, actual or threatened by the person assaulted (*f*). But if, carried away by passion or resentment, he uses violence altogether disproportioned to the occasion, he becomes in turn the aggressor, and will be answerable for the consequences.

The authority of the master of a house is sufficient to justify a policeman in turning out an intruder at his request; and, although in a licensed public-house a customer is entitled to be furnished with refreshments on tendering payment, he may be turned out by the landlord for being troublesome, otherwise not. As regards the right of self-defence in maintaining the possession of property, a distinction is drawn between being in possession and not being in possession of

(*a*) *Ewing v. Mar*, 14 D. 314. (*e*) *M'Lachlan v. Monach*, 2 S.

(*b*) *Cobbett v. Grey*, 4 Ex. 729, 506.

per Pollock, C. B., 744.

(*f*) *M'Farlane v. Young*, 3 Mur.

(*c*) *Tuberville v. Savage*, 1 Mo. 3. 108.

(*d*) *Read v. Coker*, 22 L. J. C. P.

the subjects in dispute. When a man is in possession, he may use force to keep out a trespasser; but if the trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance. A person cannot take the law into his own hands; and if the owner of a tenement attempts by force to recover possession of which he has been wrongfully deprived, the other party will be entitled to recover damages for the injury he has sustained, even although his own conduct is not strictly legal.

(2.) Another defence is leave and licence, which is properly raised in the case of a surgeon operating on a patient, a domestic servant submitting to be searched at the request of her mistress, and injuries inflicted in the playing of games.

(3.) A moderate chastisement is allowed for the purpose of correction in the relations of parent and child, master and apprentice, schoolmaster and pupil. The question in all these cases is whether the party has exceeded the moderation which he is bound to use in the exercise of proper discipline. He will not be interfered with for every slight excess or supposed excess, or for every mistaken imprudence with regard to the manner in which the correction is administered; but if the results justify the inference that there has been undue severity, it is for the defender to show that there was no intention to injure the pupil, and that in ordinary circumstances injury would not have resulted from the blow (*a*). The authority of a master or schoolmaster to inflict chastisement comes to him as the delegate of the parent.

Another responsible position is that of a master of a ship, who from the necessity of the case is entrusted with considerable powers over the passengers and crew. He may justify the flogging of his sailors on the ground of mutinous and

(*a*) *Muckarsie v. Dickson*, 11 D. v. *Brown*, 10 R. 163 (stroke on 4; *Scorgie v. Laurie*, 10 R. 610 the head with a pointer, followed by congestion of the brain,—master acquitted, blow not being proved to have been the cause of supervening accident and not fault); *Ewart* illness).

disobedient conduct, and he has the power of putting in irons any one threatening to do mischief. The master of a ship has been likened to a despot; and so he is at the time, but subject to one important qualification, viz. that he must be prepared to answer for his conduct when he comes home. He is entitled to inflict any punishment which is reasonably necessary to enforce obedience to his commands in all lawful matters relating to the navigation of the ship and the maintenance of good order. But a seaman on his arrival in port may bring an action of damages against the captain for the manner in which he has acted towards him, and the question in all such cases is—Has he acted with due moderation? (*a*). The best proof that he did not resort to the steps complained of without due inquiry and due consideration, is that, before acting, the other officers were taken by him into consultation, and that they concurred with him in the necessity of the measure which he proposed (*b*).

A person complaining of an assault must come into Court pure; for if there is provocation, though greatly less than what is returned, it is a justification. Words, however galling, can never justify a blow either in a Criminal or a Civil Court (*c*); but the provocation may have an important bearing on the question of damages (*d*). In an altercation it may be shown that the pursuer was himself the aggressor, and provoked the attack by his irritating language or insulting conduct. The defender is then excused for retaliating to a reasonable extent (*e*). But the violence inflicted in return is supposed to be done on the impulse of the moment. If he allows time to elapse sufficient to enable him to cool down, the former provocation is no justification. Nor ought the retaliation to

(*a*) *Reekie v. Norrie*, 5 D. 368. by seamen on the officers, see 17 &
 (*b*) See Lord Stowell's judgment 18 Viet. c. 104, § 243.
 in the *Agincourt*, 1 Hagg. 271, 272; (*c*) *Seymour v. M'Laren*, 6 S.
 and the *Lowther Castle*, 1 Hagg. 969.
 384; *Aitken v. Bedwell*, M. & M. (*d*) *Anderson v. Marshall*, 13 S.
 68; *Lamb v. Burnett*, 1 Cr. & J. 1130.
 291; *Murray v. Moutrie*, 6 C. & (*e*) *Hallowell v. Niven*, 5 D. 759.
 P. 471. As to assaults committed

be excessive. A blow on the head with a heavy bar of iron is not justified by the other party having begun the quarrel by giving the defender a slight blow or push with the hand (*a*). Where an assault is charged against a person acting in the discharge of an office clothed with extraordinary powers, it must be made out that these powers have been exceeded. Thus, in an action against the governor of a jail for maltreatment in prison, the jury were told that the taking hold of the prisoner was not an assault, because there was authority to do so; and if resistance is made, the person having authority may use all the means in his power to overcome it, provided it is not wantonly or oppressively used.

Seduction and Breach of Promise.—When applied to the conduct of a man towards a woman, the word “seduce” has a specific legal signification. It means carnal intercourse. If the act was committed with a married woman, the question put in issue is whether the defender did seduce and commit adultery with A. B. the wife of the pursuer, and did maintain an adulterous connection with her (*b*). Under the existing law of divorce, decree for expenses may be obtained against the co-defender if he knew her to be a married woman (*c*). But the paramour may be competently sued in a separate action, whether divorce has followed or not, and even although the husband has forgiven the wife and resumed cohabitation. —That he has pardoned the wife is no reason that he should pardon the seducer also; but the fact that cohabitation is resumed may have an important bearing on the question of damages, or as evidence in support of the plea that he connived at his wife’s dishonour. It is not material (except as affecting the damages) whether intercourse was committed with her consent or against her will; and whenever the fact of intercourse is established, it is not necessary to prove

(*a*) *Dowie v. Douglas*, 1 S. App. 125. (*c*) 24 & 25 Vict. c. 86, § 7; *Andrews v. Andrews*, 10 S. L. Rep.

(*b*) *Glover v. Samson*, 18 D. 609; 251, 11 M. 401.
M'Donald v. M'Donald, 12 R. 1327.

that the defender used any artifice or false promise to accomplish his purpose. She may have been very willing, or perhaps only imprudent. She may have been young and ignorant, while he was artful and experienced in the ways of the world, and it is needless to offer proof of the different steps by which he advanced his suit, and finally effected her ruin.

In general, however, a woman submits to carnal intercourse on the faith of a promise of marriage, *bona fide* intended when made, but not faithfully kept; and the man is liable both for breaking it, and the seduction which was accomplished on the faith of it. The practice is to grant separate issues applicable to each (*a*). The pursuer does not require to put in issue whether she was a person of virtuous conduct and untainted character. This will be presumed in her favour; and whatever may have been her former history, she will be entitled to a verdict if at the time she was living virtuously. It is no answer for the defender to impeach her chastity, but evidence on the point is relevant both as bearing on the fact of seduction as well as in mitigation of damages. In this action the damages are not measured by any known standard. The jury are allowed a large latitude, and so long as they abstain from passion, prejudice, and partiality, their award will be upheld (*b*). They are entitled not only to recompense the pursuer for the injury she has suffered in her feelings and affections, and the grief which she has brought on her family, but to a reasonable extent to punish the defender also for his own heartless conduct.

In actions of breach of promise the parties are now competent witnesses (*c*). There is a clear distinction between the proof necessary to establish a promise which is to be made

(*a*) *Paton v. Brodie*, 20 D. 258; 1243; *Sinclair v. Rowan*, 23 D. *Forbes v. Wilson*, 6 M. 770. Seduction 1365; *Cattanach v. Robertson*, 2 M. only, *Kay v. Wilson's Trs.*, 12 D. 845; 839.

Walker v. M^cIsaac, 19 D. 340; (*b*) *Berry v. Da Costa*, L. R. 1 C. *Gray v. Brown*, 5 R. 971. Breach P. 331.

of promise, *Tucker v. Aitchison*, 9 (*c*) 37 & 38 Vict. c. 64, § 1, re-pealing 16 & 17 Vict. c. 20, § 4.

the foundation of a declarator of marriage, and the same promise when the object is damages. The former requires to be direct and specific; the latter may consist of inferences drawn from the parties' behaviour towards each other, and the terms of the letters which passed between them. It is assumed that the promises are mutual (*a*); but if there is evidence that the intended husband made the promise, it may be assumed that it was assented to (*b*).

It is a sufficient cause for the non-implement of the contract that the defender discovered, subsequent to the promise, that the woman had fallen with child to another man—even though it happened years ago, and she has since been leading a proper life. The fact should have been disclosed to the man who wanted to marry her, and the woman is not entitled to take advantage of her deceit. But it is otherwise if it was known to him when he made the promise, unless he aver, and offer to prove, that she has since gone again astray (*c*). It is an unsettled point how far failure in health, physical and mental, will release either of the parties from the engagement; but it is thought that it is an implied condition of its existence that both parties shall continue to enjoy that measure of health which is essential to family happiness (*d*); and a party who subsequently discovered that his intended wife had been in a lunatic asylum, ought not to be compelled to marry her. There is a decision to the opposite effect in the English Courts (*e*), but it fails to give due influence to the undoubted fact that insanity is one of the forms of transmitted disease. It is also a good excuse that the defender was induced to make the promise, or to continue the connection, by misrepresentation, or wilful suppression of material facts affecting the family and pursuer's history (*f*).

(*a*) *Daniel v. Bowles*, 2 C. & P. 553.

(*b*) *Ibid.*; *M'Candy v. Turpy*, 4 S. 520.

(*c*) *Young v. Murphy*, 3 Bing. N. C. 54.

(*d*) *Hall v. Wright*, 29 L. J. Q. B. 43.

(*e*) *Baker v. Cartwright*, 30 L. J. C. P. 364.

(*f*) *Wharton v. Lewis*, 1 C. & P. 529.

In the case of *Campbell v. Sassen* (a), the Court had ordered the defender to make an annual allowance to a discarded mistress, after she had failed to establish a marriage out of certain writings not given *intuitu matrimonii*, but for another purpose. The House of Lords reversed the judgment, on the ground that the connection had been commenced and maintained without deception on the man's part. "Even although a person be so immoral" (said Lord Gifford) "as to treat a lady as his wife, and to hold her out to the world as his wife, yet she knowing and he knowing that they are not married, it is not competent for that lady to bring an action of damages against him" (b). To entitle her to damages, it should appear either that there had been a sham marriage, or that she had been prevailed upon to live with him on the faith of marriage at some future period, or that being about to break off the illicit connection, she had been induced to continue to live with him as his wife, on the assurance that he would marry her. Each of these would be a ground of action on her part. But when the connection was her own voluntary act, she had no right to redress. The damages are given because the man "*dolose*" had induced the woman to trust him" (c).

A promise of marriage may be proved *rebus ipsis et factis*, by correspondence, evidence of courtship, confessions made to intimate friends, and by such circumstances as that the defender instructed the lady's agent to write out a contract of marriage (d). The issue in an action for breach of promise is, Whether the defender promised and agreed to marry the pursuer, and whether he wrongfully failed to perform said promise? If the defender relies on unchaste or improper behaviour as his excuse for non-performance, the pursuer is entitled to full notice in the record of the circumstances to be proved, so that she may be in a position to contradict them at the trial.

(a) 2 W. & S. 309.

(b) Per Lord Gifford, *ibid.* 331.

(c) *Hislop v. Ker*, M. 13,908;

M'Candy v. Turpy, 4 S. 527.

(d) *Tucker v. Aitchison*, 9 D. 21.

The damages recoverable for seduction of a married woman depend upon the situation in life of the parties, the terms on which the spouses lived, the mode in which the husband discharged his marital duties, and the happiness which his wife's society was calculated and likely to afford. In the first case the Court included in the sum awarded as damages the expenses of a process of divorce, which the injured husband had obtained in respect of the adultery (a). But the bringing of a divorce is not a condition precedent to the maintenance of this claim (b). Nor is it any defence to this action, that the husband, prior to the adultery, voluntarily relinquished his wife's society, and had since lived apart. These, however, are all facts to be laid before the jury in mitigation of damages. And in like manner it may be shown, that the defender deserted or neglected his wife, and threw her purposely in the way of temptation—that she was not known to be a married woman—that she had herself solicited and enticed the defender into the connection.

Trespass to Property.—Spuilzie is the taking away or intermeddling with moveable goods in the possession of another, without his consent and contrary to the due order of law. The goods are carried away openly under pretence of some right or title, and not clandestinely as in the case of theft and robbery. By the law of Scotland the stain of theft is indelible until the property finds its way back to the true owner; and whether it has passed through a public market or not, the *vitium reale* entitles the owner to follow the goods and reclaim them in the hands of a *bona fide* purchaser for value (c).

When a spuilzie is committed, action lies against the delinquent, not only to restore to their former possessor the

(a) *Steedman v. Coupar*, M. 7337 and 13,909. The same result is now attained under the Conjugal Rights Act by making the paramour a party to the action of divorce. 24 & 25 Vict. c. 86, § 7.

(b) *Maxwell v. Montgomery*, M. 13,919; *Paterson v. Bone*, M. 13,920.

(c) *Todd v. Armour*, 9 R. 901.

goods or their value, but all the profit he would have made from them if his possession had remained undisturbed. These profits, which in former times were estimated by the pursuer's own oath, get the name of violent profits, because they are not due except in the case of "violence or wrong." The action prescribed in three years (a); but this limitation only affected the claim of violent profits provable by the party's own oath, and did not apply to an action for simple restitution and damages, which was competent against the spoliator at any time within forty years.

"The action," says Erskine, "is grounded on this plain principle, that 'no man is to be stripped of his possession but by the order of law' "(b). The owner may himself become liable by turning one out of the possession who had acquired it lawfully—as when one carries off goods from the custody of a pledgee, or deprives another of his right of retention. It is also immaterial to what species of title the possession may be referable, if the possession existed in point of fact. When a party boarded a wrecked and dismasted ship in the possession of a salving crew, on the ground that under the privilege of "wreck, wair, and waith," which belonged to the adjoining barony, the proprietor had the right to seize all wrecked vessels, they were found liable in damages to the first salvors, who, it was held, had previously lawfully assumed possession of the vessel in the open seas for behoof of all concerned (c). In another case, where a number of boats had joined in pursuit of a shoal of whales off the Shetland Islands, it was held that the whales caught belonged absolutely to the entire party, and certain boats from an adjoining island, which had been wrongfully prevented from sharing in the booty by the forcible proceedings of the main body, were held entitled to damages (d). If one of several persons carries away what belongs to all, that is a spuilzie; and any person who advises and takes an active part in such a

(a) 1579, c. 81.

(b) Inst. 4. 1. 15.

(c) *M'Dowal v. M'Dowal*, 1 W. & S. 22.

(d) *Stove v. Cotvin*, 9 S. 633.

proceeding is liable for the whole loss occasioned by the illegal act (a). The penal consequences of the action may be met by restitution *de recenti*, but the right to damages is not thereby affected.

The action is not only competent against the spoliator or principal defender, but against all concerned, each being liable *in solidum*. If the proceedings are defended by the production of a judicial warrant, *ex facie* regular, the pursuer may show that it was part of the plan, and was obtained *ex parte* with malice and without probable cause, but he must take an issue* to prove it (b).

An action also lies for the specific recovery of goods wrongfully detained from the person entitled to the possession of them, and for the damages occasioned by such wrongful detainer. It is immaterial how they were obtained originally by the person in fault—whether rightly or wrongfully; it is enough that he is keeping them now from the rightful owner; and if, after the demand is made, he parts with the possession to another, his liability is not affected (c).

In cases arising out of the wrongful detention of moveable property, solatium for the wrong and annoyance which may be caused is sometimes claimed along with the damages. For this there is no foundation. The damages, however, may include compensation for incidental loss, such as that claimed and sustained in the case of *Snare v. Earl of Fife's Trs.* (d). In this case a bookseller came to Edinburgh from Reading with a celebrated picture (Velasquez' portrait of Charles I.); it was seized under a sheriff's warrant obtained on the allegation that early in the century the painting had been "surreptitiously abstracted" from a London collection, but which the defenders were unable to prove. In an action of damages for the illegal seizure the pursuer was held entitled to recover the loss which he had sustained during the six weeks his exhibition was

(a) Lord Gillies, *ib.*; Ersk. 4. 1. (c) *Robinson v. N. B. Ry.*, 2 M. 841.

(b) *Graham v. M'Lachlan*, 15 D. (d) 13 D. 286.
889.

closed, when the picture was withheld from his possession, and for the injury done to his business in Reading by the scandal caused by the proceedings (a).

(a) For cases of wrongous seizure, *Pringle v. Bremner & Stirling*, 5 M. see *Paterson v. Walker*, 11 D. 167; H. L. 55; *Walker v. Cumming*, 6 *Cleland v. Todds*, 11 D. 1039; M. 318; *Christie v. Thompson*, 20 *Barnet v. Whyte*, 11 D. 666; *Bell* D. 1114.
v. Black & Morrison, 3 M. 1026;

CHAPTER VI.

ROAD AND RAILWAY ACCIDENTS.

Contributory Negligence.

NEGLIGENCE in the management of a horse or vehicle on a public thoroughfare, is a pure jury question. To drive at a speed which, considering the time, place, and the state of the traffic, is immoderate; to entrust a fractious horse to a lad unaccustomed to horses, and unskilful in their management (*a*); to be intoxicated; to drive without lights (*b*), or with harness imperfect from wear and tear; to keep too close to another vehicle in front (*c*); to ride, not on the box, but on the shaft, where a full view (*d*) of the street could not be had; to loiter behind a cart, leaving the horse unattended (*e*),—are all facts from which negligence may be inferred, if an injury follows which might otherwise have been prevented. But the owner of a horse is not liable for its suddenly bolting (*f*), or becoming unmanageable from a vicious disposition of which he had no notice (*g*).

The general principle applicable to all forms of traffic in a public thoroughfare, is that people should take care of themselves by keeping out of each other's way. In the case of two heavy waggons, either of which would do serious damage to the

(*a*) *Brown v. Fulton*, 9 R. 36.

(*b*) *Gibson v. Milroy*, 6 R. 890. 1186.

(*c*) *Auld v. M'Bey*, 8 R. 495.

(*d*) *Grant v. Glasgow Dairy Co.*, N. S. 588; *Manzoni v. Douglas*, L. R.

9 R. 182.

6 Q. B. D. 145.

(*e*) *Baird v. Hamilton*, 4 S. 790,

14 R. 327.

(*f*) *Shaw v. Croall & Sons*, 12 R.

1186.

(*g*) *Hammack v. White*, 11 C. B.

N. S. 588; *Manzoni v. Douglas*, L. R.

6 Q. B. D. 145.

other if they came into contact, this duty is evidently reciprocal ; but in point of fact the obligation is just as incumbent on a foot passenger or light gig as on a heavy vehicle, although the damage in the event of a collision between them would probably be all on one side. As an aid to the observance of this duty, what is called the rule of the road has been introduced. Originating in custom, it came to be judicially recognised, and to have the force of law, and latterly received statutory sanction. The recent Roads and Bridges Act, incorporating a clause in the General Turnpike Act, enacts that "if the driver of any sort of carriage shall not keep to the left or near side of such road on meeting or on being overtaken by any other carriage or any rider, or shall wilfully prevent any other person passing him or his carriage ; such driver shall for every such offence forfeit and pay a sum not exceeding £5 over and above the damages occasioned thereby" (a). This rule applies to both saddle horses and carriages (b), and if one happens to be on the wrong side of the road the fact is evidence against him. It does not, however, release the man advancing in the opposite direction from the duty of passing to the wrong side, and so avoiding the collision if it is possible to do so (c).

The footpath by the side of the road is for the accommodation of foot passengers only, and the use of it by horses and vehicles is forbidden by statute (d). But a foot passenger has a right to walk on any part of the road : and the recent cases have all gone on the principle that, as it is the duty of a driver to avoid persons on the roadway, *prima facie* there is fault leading to liability if he "knocks up" against a foot passenger. It is then for the driver to explain his conduct ; but unless the injured person was himself to blame (e),

(a) 41 & 42 Vict. c. 51, § 123 (Sch. C. § 97).

(b) *Turley v. Thomas*, 8 C. & P. 103.

(c) *Turley, sup.* But as to Tramways, see *Jardine v. Stonefield Laundry Co.*, 14 R. 839, and *post*.

(d) 41 & 42 Vict. c. 51, § 96.

(e) *M'Kechnie v. Couper*, 14 R. 345 ; *Anderson v. Blackwood*, 13 R. 443 ; *Davies v. Mann*, 10 M. & W. 546.

or by the exercise of ordinary care could have avoided the consequences of the driver's negligence, he is entitled to recover. A negligent driver is always ready to throw the blame on the person hurt, by showing that if he had gone to the right instead of to the left, or stood still instead of trying to escape, no accident would have happened. But this will not avail. "There are many cases," it has been said, "in which if a wrong-doer puts you into a position of danger, so that you are called upon hastily to take some steps, and you do happen then to take the wrong course, that there you are excused as against the wrong-doer" (a). In coaching accidents a man has often to choose between jumping off and being thrown off, and possibly killed in either case; and Lord Ellenborough held that the person who by his misconduct had placed another in such a dilemma is responsible for what happens whichever alternative he adopts (b). Thus when a train stops past the station, and a passenger, fearing to be carried beyond his destination, tries to get out, and is injured by the train suddenly backing into the station, it is for the jury to say whether the passenger ought to have sat still or not (c); for between the inconvenience of sitting still and the danger of moving there ought to be some reasonable proportion. If the inconvenience is small, and the danger great,—as when a passenger tries to fasten a door which flies open when the train is going at a high velocity, with the result that he falls out,—a jury will be justified in finding that he ought not to have encountered the risk, when it was obviously so great, seeing the benefit he was to get from it was so small. But when the peril is obvious either way, the person to blame for that peril is responsible for the consequences (d). Accordingly, a man who has run

(a) Per Field, J., in the *Rona*, 51 L. T. 28, 32.

(b) *Jones v. Boyce*, 1 Stark 493, 495.

(c) *Robson v. N.-E. Ry.*, L. R. 10 Q. B. 271. If the passenger falls out when leaning on the door, the pre-

sumption is that it was improperly shut and fastened when the train started on its journey; *Cassidy v. N. B. Ry. Co.*, 11 M. 341.

(d) *Adams v. Lanc. and York Ry.*, 4 C. P. 739; *Gee v. Met. Ry. Co.*, L. R. 8 Q. B. 161.

another down on the public highway, cannot excuse himself by saying that he expected him to get out of the way, as he might and should have done, if he had taken proper care of himself. The streets are open to all the public alike. A man suffering from old age, deafness, or other infirmity, is entitled to assume that drivers will take reasonable care of his safety. It has accordingly been held that it is not enough for the driver to prove that he shouted in good time, for he is bound to pull up or diverge if his warning is not attended to. To absolve him from blame he requires to show some such carelessness on the part of the passenger, as that he stepped so suddenly and unexpectedly into the danger, that it was impossible to pull up (*a*).

Contributory Negligence.—In these street accidents, and, in fact, in every case of damages, contributory negligence thus becomes an important question; because, as already explained, a man is not entitled to damages for an event for which he is either wholly to blame, or which he himself helped materially to bring about. The doctrine has been derived from the Roman law, where several cases are mentioned illustrative of the principle—"quod quis ex culpa sua damnum sentit non intelligitur damnum sentire" (*b*). The man who provoked a wild animal, by teasing it into doing him an injury, had no action against the owner (*c*). The master of a slave, who was killed by crossing the training ground where people were playing at javelin-throwing, had no action against the player who caused his death (*d*); and the person who was hurt by a ball, when being shaved by a barber, had action, not against the thrower of the missile, but the barber, who practised his vocation in a place which he knew to be dangerous (*e*).

(*a*) *Clerk v. Petrie*, 6 R. 1076;
Auld v. M'Bey, 8 R. 495; *Cotton v.*
Wood, 29 L. J. C. P. 333; *Hawkins*
v. Cooper, 8 C. & P. 473; *Williams*
v. Richards, 3 C. & K. 81; *Boss v.*
Litton, 5 C. & P. 407.

(*b*) D. 50, 17, 203.
 (*c*) Paulus Sent., Rec. i. 15, § 3.
 (*d*) Dig. L. A. 9, § 4.
 (*e*) Dig. L. A. 11, § 11, pr.

These passages also prove that, when malice enters as an ingredient (as when the javelin was purposely thrown at the slave), negligence on the part of the slave who had been killed did not disentitle his master from recovering his value. A person who has acted from malice can never plead that the other unconsciously and inadvertently assisted him in doing the injury; but in all other cases contributory negligence is pleadable as a defence to the action.

The principle embodied in the maxim—*volenti non fit injuria*, which is intended to meet the case of those who, being fully cognizant of the danger, voluntarily elect to run the risk—stands, it has been said, outside the defence of contributory negligence, and is in no way limited by it (a). The one is carelessness, the other intelligent choice; the one is negligence on the part of the pursuer himself, which has either placed him in a position of difficulty and danger, or, when so placed in such a position, has prevented him from escaping unharmed; the other is willingness to assume a known risk, with full knowledge of its magnitude, so that, practically, the defender is released from any further obligation in the matter. In many accident cases the result is the same, whether the defence goes by the one name or the other; but the two things are really distinct, and it sometimes does tend to a clearer perception of the issue when they are kept separate (b). The first embodies the doctrine, that one man cannot sue another in respect of a danger or risk, not unlawful in itself, that was visible, apparent, and voluntarily encountered by the injured person. The second deals with the point whether, granting negligence on the part of the defender, the pursuer, by reasonable care, could have avoided the injury.

We have already observed that no question of contributory

(a) Bowen, L. J., in *Thomas v. Erle*, C. J., in *Indermaur v. Dames*, *Quartermain*, L. R. 18 Q. B. D. 685, L. R. 1 C. P. 274, 277, and Cockburn, C. J., in *Woodley v. The Metropolitan District Ry. Co.*, L. R. 2 Ex. D. 384, 390.

(b) The importance of the distinction has been pointed out by

negligence can arise, except on the hypothesis that there has been blame in the defender; if there is no negligence on his part proved *cadit quæstio*(a). But when it is proved, the proper question for the jury is—Could the pursuer have avoided it? Recently, in the House of Lords, contributory negligence was thus defined,—“Contributory negligence seems to me to consist in the absence of that ordinary care which a sentient being ought reasonably to have taken for his own safety, and which, had it been exercised, would have enabled him to avoid the injury of which he complains, or the doing of some act which he ought not to have done, and, but for which, the calamity would not have occurred. I have used the words ‘ordinary care.’ Extraordinary caution is not required; but if by the use of ordinary caution he might have avoided the injury, and did not, he is not entitled to recover damages” (b).

In the case in which this was said, the dead body of a man was found at a level-crossing, evidently killed by a passing train. The only proof of negligence on the part of the railway company was that the engine did not whistle or give warning of its approach; but no living person witnessed the occurrence. On these facts it was contended for the railway company that no one could tell whether the engine ran against the man, or the man against the engine; and the House of Lords held that, although possibly the accident was due to the driver’s negligence, there were no sufficient data from which that inference could be drawn, and accordingly the company were held not liable. In Scotland the practice has been to consider contributory negligence as a plea in defence, which has to be made out affirmatively by the defender; and although not the proper subject of a counter issue, the Court, with consent of the pursuer, has allowed the defender to bring it more distinctly before the jury by taking one (c). What the defender has to establish, is that the pursuer has

(a) Per L. P. Inglis in *M’Naughton v. Cal. Ry. Co.*, 21 D. 160; *Tuff* 41, 51.

v. Warman, 5 C. B. N. S. 573. (c) *Donald v. Clyde Trs.*, 2 R.

(b) Lord Fitzgerald, *Wakelin v.* 813.

been negligent. "If he succeeds" (says Lord Neaves), "the pursuer will not recover; but if it is clear that the defender has been negligent and merely doubtful if the pursuer has, the pursuer will be entitled to recover. The *defence* of joint negligence must be as clearly established as the ground of action requires to be" (a).

As a matter of strict legal principle, it is difficult to see why in such a case the damages should not be apportioned (b); but the point is not open to discussion, for it has been long settled that neither has any action against the other, when both have been chargeable with negligence. When, however, the pursuer is only chargeable with negligence subsequent to the defender's wrongful act, the fact is not taken into account, except in estimating the quantum of the damages. He is entitled to recover to the extent of the damage which he has suffered without his fault, but no damages are due so far as the loss has been aggravated by his own misconduct (c).

Thus far we have been dealing with the case in which the parties were personally in the wrong; but the principle applies where the fault on either side is that of an agent or servant. A man driving in his carriage is answerable (to the public) for the fault of his coachman, although personally he may have been free from negligence; and if two vehicles come into collision through the fault of the men in charge, the owner of the one cannot recover against the other. In a case which occurred in the year 1849 (d), the English judges extended this principle so far as to refuse action to a passenger in one of two omnibuses, where the accident was due to the fault of both drivers, and the person sought to be made liable was the owner of the vehicle in which he had not been travelling. He was held to be identified with his own driver, just as much as a man driving in his own carriage is identified

(a) Per Lord Neaves in *M'Martin v. Hannay*, 10 M. 411.

(c) *Moffat & Co. v. Park*, 5 R. 13, *Shearman's Neg.* § 35.

(b) See Lindley, J.'s, remark in the *Bernina*, L. R. 12 P. & D. 58, 115.

(d) *Thorogood v. Bryan*, 8 C. B.

with his coachman. But it is manifest that this notion of identification cannot be supported; and the case, which has never been acted on in Scotland, was formally repudiated in *Adams v. The G. & S.-W. Ry. Co.* (a). It has also been rejected by the Courts of the United States, and was finally overruled by the English Court of Appeal in 1887 (b), in a judgment which has since been affirmed by the House of Lords (c). It is obvious that while there may be identification between an infant incapable of taking care of itself and a passenger travelling with it, there is no such relation between the driver of an omnibus and the passengers inside; he is not their servant, but the servant of his employer; and unless the relation of master and servant exists, the contributory negligence of another can never defeat the right of the person injured to be indemnified (d). It has accordingly been held that if a passenger in a train belonging to the A. Company is injured on the line of the B. Company, over which the A. Company has running powers, and the injury is due to the fault of both companies, he can sue both or either. It has also been held that the A. Company's servants are not the fellow-servants of those who are employed by the B. Company. Therefore when an accident happened on the line of the Glasgow and South-Western Company, to a train belonging to the Caledonian Company, through the fault of the station-master at Dalbeattie (a servant of the Glasgow and South-Western Company), and also of the engine-driver and guard of the Caledonian train, it was held that the Caledonian fireman, who was injured, had a good action against the South-Western Company (e).

The case of the *Bernina* arose out of a collision between two steamers, the *Bushire* and the *Bernina*, due to the fault of both. A passenger on board the *Bushire*, the first engineer,

(a) 3 R. 215.

Another (the *Bernina*), L. R. 13 App.

(b) *Little v. Hackett*, 54 Am. Rep. 135. The *Bernina*, L. R. 12 P. D. 58.

Ca. 1.

(d) *Waite v. N.-E. Ry.*, E. B. & E. 719.

(c) *Mills, etc., v. Armstrong and*

(e) *Adams v. G. & S.-W. Ry.*, *sup.*

and the second officer were drowned, and actions of compensation against the owners of the *Bernina* were raised by the representatives of each of these three persons. The Court decided in favour of the passenger and the engineer (who had nothing to do with the collision), but the second officer was in charge of the vessel at the time and was directly responsible for it, and his case was given up. The judgment agrees with a previous decision of Dr. Lushington, that in the case of a collision between two vessels, A. and B., due to the fault of both, the owner of cargo on board the A. might sue the owners of the ship B. In his opinion, the master and crew of the vessel, in which the cargo-owner's goods were being carried, were not his agents or under his control, and the fact that that ship was partly to blame did not deprive him of his remedy against the other vessel when it was also in the wrong (*a*).

Pupil-Children.—A child can never be said to be capable of contributory negligence in the sense in which that expression is applied to grown-up people. There is no room for such a question as has sometimes been discussed,—if an infant of twenty months is not capable of contributory negligence, may not a pupil of three, or five, or eight years? A child is to be held to such a degree of care as is usual among children of his age, but no more; and, in judging of his conduct, we have also to take into account, both his want of thought, and his tendency to give way to his natural instincts and get into mischief—a fact which, so far from diminishing, enlarges to a corresponding extent the obligation of those whose duty it is to provide for his safety. The negligence of his parent and guardian, in allowing him to go where he had no business to be, is imputable to the child. He may be so identified with the parent or guardian in whose care he is at the time, that the negligence of both disentitles either from recovering; or, if suffered to wander by himself into a place which, although safe enough for grown-up people, is not safe as regards him,—

a canal bank or a railway-crossing (*a*), — both parent and child will be held to have acted at their own risk. The fault here lies in letting the child go out unattended, and the party subject to the duty was entitled to expect that such a thing would not happen, the danger being “obvious and palpable.” On this ground, where a child two years old strayed on a railway and fell into an adjoining water-course and was drowned, the defenders were assoilzied (*b*); and the like was decided where the blame of an accident at a pithead, from a boy being caught by the winding chain, was held to be with his father in suffering so young a person to be around the pit (*c*). A child under three years of age strayed from an unenclosed waste piece of ground, where it was in the habit of playing with other children, on to a private line of railway laid down for a temporary purpose, and was killed by a passing engine. It was proved that the speed at which the engine was proceeding was not excessive, and that the railway was managed as cautiously as could be expected. Lord President Inglis observed, that to allow a child two and a half years of age to wander about in so dangerous a place, without any one to take charge of it, showed great carelessness on the part of the parents, and, therefore, that the defender was not liable to the pursuer in damages (*d*). Still more, when the parent may be held in the circumstances to have expressly undertaken the duty of attending to the child’s safety. Thus, a little girl was killed at a railway station when crossing the line under the care of her grandmother, with whom she was travelling. A ticket had been taken out for both; but the company was assoilzied, because it was held that in issuing the ticket they were entitled to assume that proper care would be taken of so young a child (*e*).

Wherever, again, there is trespass in regard to presence, as well as recklessness in regard to conduct on the part of the child, he is really the author of his own calamity. Of this

(*a*) *Grant v. Cal. Ry.*, 9 M. 258.

(*b*) *Davidson v. Monkland Ry. Co.*, 17 D. 1038.

(*c*) *Lumsden v. Russel*, 18 D. 468.

(*d*) *Morran v. Waddell*, 11 R. 44.

(*e*) *Waite v. N.-E. Ry.*, *sup.*

there are frequent examples, in no one of which was the defender found liable (a).

As regards, however, the public streets, where persons of all ages, young as well as old, may lawfully be, different considerations apply. Very young children must go to school or run messages; and they are accustomed to play about the doors unattended, for the mass of people cannot afford to furnish them with a nurse. The presence of children on the public streets not old enough to be able to take care of themselves is one of the risks which the drivers of wheeled vehicles require to have in view. In a recent case where two children, one three and another five years of age, were knocked down and injured while crossing a crowded street in Glasgow, the Court declined to rule that some one should have been there to take charge of them. Every driver, it was observed, knew that it was his duty not to run over children, and experience showed that with proper care this could be done (b). If the child so acts as to be the sole cause of the accident, as by rushing suddenly in front of the advancing vehicle, and so near thereto as to make it impossible for the driver to pull up, the driver is not responsible for an event which he did nothing to cause, and which he could do nothing to prevent (c). But in this case the driver is acquitted because he is free from blame, not on account of the contributory negligence of the child; and if he was himself in fault, as by driving at an excessive speed, it is not likely that he would be exonerated because it was a child of tender years and not a grown-up person that he happened to run down.

Persons who are under a duty to provide for the protection of the public by fencing a road at a dangerous point,

(a) *Balfour v. Baird & Brown*, 20 D. 238.

(b) *Martin v. Wards*, 14 R. 814.

(c) *Fraser v. Edin. Tramway Co.*, 10 R. 264. In this case there was evidence to sustain a verdict of fast driving against the driver; also of

contributory negligence on the part of the boy (six years old), which the jury had ignored. A new trial was therefore granted, and resulted in a verdict for the defenders, the jury finding that the speed was not excessive.

are assumed to have in view the possibility of children coming to the place too young to take care of themselves, and prone to get into mischief. In a sense they bring the injury on themselves, and their parents may be open to reproach in allowing them to go out unattended. But it is better to require that the party subject to the obligation shall provide absolutely against the existence of danger, than to trust to children having sense enough to keep out of it; and to expect parents to keep them off the streets is impossible (*a*).

A person who carelessly leaves on the public street an implement, like an oil-cake crushing machine, which may prove dangerous to children, cannot urge that it was safe enough if left alone (*b*); and one who is bound to provide for the safety of all is bound to take into account the possibility of children coming about and doing things which grown-up people would not do. Thus, where a cart and horse had been left unattended on the public street, the plaintiff, a child under seven years of age, playing on the street with other boys, was getting into the cart when another boy, by exciting the horse, set the cart in motion and he was injured. It was contended that the accident was caused, not by the negligence of the man in charge, but of the boys themselves, and the plaintiff's own improper conduct in mounting the cart; but the Court said: "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress against both, or either of the two, but unquestionably against the first." The principle is the same as if a gamekeeper left a loaded gun against the wall of a playground where some schoolboys were at play, and one of them should let it off and wound

(*a*) *Greer v. Stirlingshire Road Trs.*, 10 R. 1069. Fence where road crossed a burn composed of posts of 2 ft. 9 apart; child 22 months old accompanied by another infant of 3½ years crept through the fence, fell into the burn, and was drowned. Road Trustees liable.

(*b*) *Campbell v. Ord & Maddison*, 1 R. 149; *M'Gregor v. Ross & Marshall*, 10 R. 725.

another boy. Beyond doubt, the gamekeeper must answer in damages to the wounded party (*a*). So, where an accident arose from the fall of a cellar flap,—a boy five years old who got upon it, having in jumping off brought it down on himself and another boy,—it was held that while the boy whose act had brought down the flap could not recover, the other boy who had been injured could, provided he was not a joint actor with him (*b*).

Trespasser.—A special instance of contributory negligence is where the party is himself a wrong-doer. Being engaged at the time in an act which he knows to be contrary to law, he is *versans in illicito*, and the answer to his claim is conclusive. Except where the place is close to a public thoroughfare, and so open and unprotected as to invite stragglers, a proprietor is under no obligation to provide for the safety of those who may under all circumstances chance to come on his property, especially when their object is violence or plunder. In former times a practice prevailed of frightening trespassers by setting spring guns, and it was held that a person who had been injured by one of these dangerous weapons, when trespassing in a wood, with notice that they were set, had voluntarily exposed himself to the mischief which had happened, and had no right to damages. The decision (*c*) gave rise to much public discussion at the time (*d*), which ended in an Act being passed declaring the practice to be illegal in England and Ireland (*e*); and the same conclusion would be reached in Scotland by the common law, which holds that a bare trespass unaccompanied by any fraudulent purpose would not disentitle the person injured by such instruments from recovering compensation. They have been pronounced by English judges to be an unreasonable exercise

(*a*) *Lynch v. Nurdin*, 1 Q. B. 29, 35.

(*b*) *Hughes v. Macfie*, 2 H. & C. 744.

(*c*) *Hott v. Wilkes*, 3 B. & Ald. 304.

(*d*) See Sydney Smith's essay (reprinted in his works), Edin. Review, vol. xxxv. pp. 123, 410.

(*e*) 7 & 8 Geo. IV. c. 18, since repealed, and re-enacted 24 & 25 Vict. c. 95, § 1, and *ib.* c. 100, § 31.

of the right of property, exposing a person innocently trespassing to a danger out of all proportion to the benefits gained from frightening people off the premises (a); and in a parallel case it has been held that if a passenger on a railway is injured through the fault of the company, it was no answer to the claim that he had on the occasion travelled beyond the station for which his ticket had been issued, there being no proof that he was seeking to evade payment of his fare (b). In *Bird v. Holbrook* the plaintiff was also a trespasser (c). He had strayed into a neighbour's garden in the pursuit of a pea-hen, unaware that the proprietor, who had been much troubled with depredators, had set a spring gun. When in pursuit of the bird his foot came in contact with the wire, and the gun went off and injured him. It was held, that although it was his own act which had caused the gun to go off, the unlawful act of the defendant in setting it there was the primary cause of the damage, and he was therefore liable for the consequences.

It has been observed, that "where one is in fault, he is answerable for the consequences of that fault, even although these consequences might have been prevented by another person exercising his judgment in a different way from what he in fact did: even criminal responsibility will attach to the original wrong-doer in such a case" (d). He is responsible for all the natural consequences of his act; and, provided there is one continuous train of causation between the moving cause and the final result, it is immaterial whether some of the intervening links are due to natural causes or the act of a third party. Thus, where a man chose to leave a cart unattended on the street, and a passer-by whipped the horse, causing it to back against the plaintiff's window, it was urged that the man who whipped the horse and not the defendant was liable; but it was held that the primary cause of the

(a) Per Bayley & Holroyd, JJ.,
supra.

(b) *Hamilton v. Caled. Ry.*, 19 D.
457.

(c) 4 Bing. 628.

(d) Per Lord Young in *Keddie,
Gordon, & Co. v. North British Ry.
Co.*, 14 R. 233, 237.

injury was the wrongful leaving of the horse on the street unattended; and a man who does so takes the risk of any accident which might happen (*a*). The same follows when the event leading to the injury, when once started, is due to natural causes. A wrong-doer has to take his chance of a storm of wind, a heavy rainfall, or a fall of snow.

Roadworthiness of Vehicles.—When an accident occurs from the breakdown of a public conveyance, the presumption is that it occurred from some defect in the vehicle, and the *onus* is on the proprietor or the hirer to show that “all that man could do was done to provide against accident” (*b*). There is, it has been said, no analogy between the case of a lessor and lessee of a heritable subject, and that of one who contracts for the supply of a carriage or a seat in a stand on a racecourse. In a lease of heritage the tenant satisfies himself as to the condition of the premises and makes his contract accordingly, agreeing to take the premises as he finds them, or binding his landlord to make certain repairs and alterations, and there is no obligation on the landlord to do more. But in a contract for the supply of a carriage, or for the use of any moveable, the lessor contracts—(1) that the article shall be reasonably fit for the purpose to which it is to be applied; but (2) “he does not contract against any unseen and unknown defect which cannot be discovered, or which may be said to be undiscoverable by any ordinary or reasonable means of inquiry and examination” (*c*).

The expression “reasonably fit,” it has been said, denotes something short of absolutely fit; but the difference between the two is not great, for the *onus* is on the owner of a carriage to show that it was as fit for the purpose for which it was hired as care and skill could make it (*d*). According to the view originally taken, this obligation was satisfied by

(*a*) *Illidge v. Gordon*, 5 C. & P. 190; *Harris v. Mobbs*, L. R. 3 Ex. D. 268. (*c*) Per Kelly, C. B., in *Francis v. Cockrell*, L. R. 5 Q. B. 501, 508.
 (*b*) *Lyon v. Lamb*, 16 S. 1188. (*d*) *Hyman v. Nye*, L. R. 6 Q. B. D. 685.

evidence that the carriage was sufficient so far as the eye could discover; but, since the growth of railways, the tendency has been gradually to increase the responsibility, and to exact a higher degree of care than corresponds with simple negligence. *Readhead v. The Midland Railway Company* (a) was an action which had arisen out of a railway accident, caused by the tire of a wheel flying off, the result of a flaw in the welding due to an air-bubble, an occurrence which it was proved sometimes happened in spite of the greatest care in the process of manufacture, and was undiscoverable then or afterwards, either by the eye or from the ringing of the metal. The direction given to the jury was, that if the accident was occasioned by no neglect on the part of the defenders, but by a latent defect, such as no care or skill on the part of the defenders could detect, the verdict should be for the defenders; and this was held to be a proper direction. The same ruling was applied in a case in which the plaintiff had hired from the defendant, a jobmaster, for a specified journey, a carriage, a pair of horses, and a driver. During the journey a bolt in the under part of the carriage broke, the splinter bar became displaced, the horses started off, the carriage was upset, and the plaintiff injured. It was proved at the trial that no fault could be imputed to the horses or to the driver. The carriage had been built by a good builder seven or eight years before the accident, and was repaired by a competent person some fifteen months before it, and the defendant had no reason to suppose that there was any defect in the carriage or in its bolts, and that the defect, if any, in the bolt which broke could not have been discovered by any ordinary inspection. The jury having found for the defendant upon the judge's direction that they were bound to do so if, in their opinion, he took all reasonable care to provide a fit and proper carriage, it was held that this was wrong, for it was the duty of the defendant to supply a carriage as fit for the purposes for which it was hired as care and skill could render it, and the evidence was not such as to show that the

(a) L. R. 2 Q. B. 412.

breakage of the bolt was, in the proper sense of the word, an accident not preventible by any care or skill, or to warrant the finding of the jury that the carriage was reasonably fit for the purpose for which it was hired (*a*).

When two persons hire a vehicle, both of them are liable for the negligence of one of them in driving, for it was in their joint possession at the time; but to make a third party liable for the negligence of the driver of a carriage, the relation of master and servant must subsist between them at the time.

A man having sent his van and vanman to a brother tradesman for the removal of some articles, the latter sent his shopman with them, and the driver being drunk, the shopman took the reins. An accident having happened by the way, the owner was held liable, as well as the shopman who was driving, but not the shopman's employer, although the van had been lent for his benefit, as the shopman had acted beyond the sphere of his employment in presuming to act as driver (*b*).

Tramways.—It has been held in England that a tramway laid down on a public highway without lawful authority is a nuisance; for, whatever advantages it may confer on the public who use it as the means of locomotion, it is a material obstruction to the ordinary traffic (*c*). Tramways, however, are now in general use in our large towns, constructed either under local Acts or under the General Tramway Act of 1870 (*d*).

This Act creates facilities for the construction and regulation and working of tramways. It contains provisions as to the mode in which Provisional Orders for the construction of a tramway are to be obtained, prescribes the manner in which the tramway so authorized shall be constructed, and imposes upon the promoters the burden of maintaining, in such manner as the road authorities shall direct, and to their satisfaction,

(*a*) *Hyman v. Nye*, *sup.*

(*b*) *Martin v. Wards*, 14 R. 814.

(*c*) *Reg. v. Train*, 31 L. J. M. C.

169.

(*d*) 33 & 34 Vict. c. 78.

so much of the road as lies between the rails of the tramway. It also authorizes the Local Authority, which in towns is the Town Council, and in burghs the Police Commissioners, and in any part of a parish over which these bodies have no jurisdiction the Road Trustees, to pass byelaws regulating, *inter alia*, the rate of speed and the traffic on the road on which the tramway is laid (*a*). By this statute it is made an offence to obstruct any carriage using the tramway, or to endanger the lives of persons therein or thereon (*b*). It also enacts that the promoters or lessees, as the case may be, shall be answerable for all accidents, damages, or injuries happening through their act or default, or of any person in their employment, by reason or in consequence of any of their works or carriages, and that they shall save harmless all road and other authorities, companies, or bodies, collectively and individually, for all damages or costs in respect of such accidents, damages, and injuries (*c*). This clause is simply declaratory of the common law, and was not intended to impose any additional responsibility on the company. It is confined to accidents happening through some wrongful act of theirs, either in the original laying down of the line or its negligent use after it is constructed. Subject to certain regulations and with the licence of the Board of Trade, steam power may be used; and it has been held under the above clause, that where a steam car, without negligence on the part of the driver, caused a horse to take fright, and injured it, nobody being to blame, there was no liability upon the company (*d*).

Before the introduction of tramways the rule of the road was universal, that one carriage overtaking another shall pass on the right-hand side. But a tramway has a double line, and were this rule to be enforced on a street where the use of these vehicles is lawful, the carriage going to the right

(*a*) Constituted under the Roads and Bridges Act, 41 & 42 Vict. c. 51, § 32.

(*b*) § 50.

(*c*) § 55.

(*d*) *Brocklehurst v. Manchester Tramway Co.*, L. R. 17 Q. B. D. 118.

might come into collision with another car coming in the opposite direction. A driver, therefore, must pass a tramway car on the left-hand side, and in like manner it is the duty of a passenger getting off a car to descend on the left-hand side also. He is bound to look if no vehicles are coming from behind; and where a man descending from a car was run over through neglecting this precaution, he was found not entitled to recover (*a*). The space between the car and the pavement must be looked on in fact as an ordinary street crossing.

If a vehicle is stopped on the tramway for some proper purpose, *e.g.* a cab to take up a passenger, the driver of a car must stop also. The streets are for the public use, and as vehicles must occasionally stop on tramway lines, the driver of a car is not entitled to drive into any obstacle that does not get out of the way. The company has a certain monopoly of a particular description of traffic in virtue of their ownership of the rails, but that monopoly is subject to this important qualification, that the rails are to be used in a manner consistent with the state of public traffic (*b*).

Traction Engines.—The use of locomotives on highways in Scotland is regulated by a number of Acts, the first of which was passed in 1861. These Acts prohibit the use on any highway—meaning thereby any road, street, or bridge maintained out of public funds—of any locomotive not constructed in accordance with certain regulations as to weight, dimensions, breadth of wheel, etc., and the Local Authority is empowered to make byelaws as to the hours during which locomotives may be used (*c*). Three persons at least must be employed to conduct the locomotive, and an additional person if more than two waggons constitute the load. One of these persons, while the

(*a*) *Jardine v. Stonefield Laundry Co.*, 14 R. 839; *Ramsay v. Thomson*, 9 R. 140.

(*b*) Per Lord Moncreiff in *M'Dermid v. Edin. Tramway Co.*, 12 R. 15.

(*c*) 24 & 25 Vict. c. 70; 28 & 29 Vict. c. 83; 41 & 42 Vict. c. 77—An Act to amend the law relating to highways in England, and the Acts relating to locomotives on roads.

locomotive is in motion, must accompany it on foot, and in case of need assist horses and carriages drawn by horses passing the same. Another regulation is that every locomotive is bound to stop when signalled by the man in front or by any other person with a horse, or carriage drawn by a horse, to do so.

While these Acts render legal the use on the public highway of locomotives properly constructed, it has been held that they do not exempt the owners from liability for injury or damage which may result from their use. They are dangerous machines, and their use on the public road has been sanctioned by Parliament on certain conditions, one of which is — “Nothing in this Act contained shall authorize any person to use a locomotive which may be so constructed or used as to be a public nuisance at common law, and nothing herein contained shall affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive” (a). It is therefore unnecessary to prove any negligence if the injury is directly traceable to the presence of the locomotive. The effect of the statute is simply to authorize any person to employ them at his own risk. It was accordingly decided that where a haystack built upon the other side of the hedge close to the road had been set on fire by sparks from the engine and burned down, the owner of the locomotive was liable, although there was no fault or negligence imputable to the men in charge (b).

Railways.—In regard to the burden of proof in cases of railway accidents, the rule is thus laid down by Mr. Justice Willes (c). It is not enough (he said) for the plaintiff to show that there has been an accident upon the defendants’ line, and thence to argue that therefore the company are

(a) 28 & 29 Vict. cap. 83, § 12.

(b) *Powell v. Fall*, L. R. 5 Q. B. D. 597; see also *Watkins v. Redding*, 2 F. & F. 629; *Jones v. Festiniog Ry. Co.*, 3 Q. B. 733; *Rex v. Pease*,

4 B. & Ad. 30; *Vaughan v. Taff Ry. Co.*, 5 H. & N. 679.

(c) *Daniel v. Met. Ry. Co.*, L. R. 3 C. P. 216, 222; reversed, but on a separate point, at p. 591, *affd.* L. R. 5 H. L. 45.

liable even *prima facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may be fairly inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; "And I go further, and say that the plaintiff should also show with reasonable certainty what particular precautions should have been taken."

A person is found killed on a line of railway. There is no evidence to prove how he got there. In this case the company are not liable. Nor are they liable where the accident is due to a mere failure to perform a self-imposed duty, as when a gate usually fastened when a train was coming was found unfastened, and the person killed accepted it as an intimation that he might cross in safety (a). But when the neglect consists of the omission of a statutory duty, as when at a level-crossing the company failed to erect a gate or stile in terms of the statute, and a child four and a half years old was found lying on the level-crossing, a foot having been cut off by a passing train, the evidence was deemed sufficient to justify a verdict of liability (b).

There are many situations in which a railway company are bound to take additional precautions beyond those imposed by the statute, for the company accepts the privileges conferred on them by Parliament on the implied understanding that in the working of the traffic they will take all such precautions as are proper and necessary for securing the public safety. But a precaution proper in one place may be quite uncalled for in another. If a sharp curve, a bridge, a tall hedge, prevents people crossing by a footpath on the level from seeing the coming train, it may be expedient for the driver to sound the engine whistle before coming to the crossing. But this is not a matter of legal obligation, for there are hundreds of footpaths in country districts where such a precaution is unnecessary.

(a) *Skelton v. L. & N.-W. Ry.*,
L. R. 2 C. P. 631.

(b) *Williams v. Gt. West. Ry.*,
L. R. 9 Ex. 157.

It is for the jury to say whether in the circumstances its omission was fault (*a*).

When a railway crosses a highway not on a level, and the Act is silent on the subject, the line may, in the option of the company, go under or over the road—with this difference, that if the road is carried over the railway by a bridge, the company is bound to repair the bridge and its approaches; but if the highway is lowered so as to let the line pass over it, the highway is still to be maintained by the road authority (*b*).

When a railway, under the powers of an Act of Parliament, crosses a highway on the level, it is the duty of the company to keep the part of the way used by the public in a state of repair suitable for the ordinary and regular traffic (*c*). The company are also bound by statute to have gates on either side of the line under the care of a gatekeeper, whose duty it is to see that they are closed as soon as the road traffic has passed through (*d*). This virtually makes the gatekeeper the judge when it is safe to cross and when it is not; and consequently the fact that the gate is standing open is an invitation to cross. To have it open at an improper time was held to be fault in the company sufficient to render them responsible for the accident (*e*). If the crossing is a bridle-way, or “other than a public carriage-way,”—such as an approach to a farm-house,—it is also to be furnished with gates, which are to be kept shut, but the railway company are not entitled to lock them in the ordinary case (*f*).

As regards footpaths, the only obligation on the company is to have gates or stiles erected (*g*); but it is not

(*a*) *Russel v. Caled. Ry.*, 7 R. 148; *Davey v. L. & S.-W. Ry.*, L. R. 11 Q. B. D. 213. responding to § 47 of the English Act 8 Vict. cap. 20. See *Ellis v. L. & S.-W. Ry.*, 26 L. J. Ex. 349; *N.-E.*

(*b*) *Reg. v. S.-E. Ry.*, 32 L. T. N. S. 858; *N. S. Ry. Co. v. Dale*, 8 E. 185. *Ry. Co. v. Wanless*, 43 L. J. Q. B.

& B. 836; *L. & N.-W. Ry. v. Skerton*, 33 L. J. M. C. 158. (*e*) *Woods v. Caled. Ry.*, 13 R. 1118.

(*c*) *Oliver v. N.-E. Ry. Co.*, 43 L. J. Q. B. 198. (*f*) 8 & 9 Vict. c. 33, § 52, 60, 68; *Macpherson v. Callander & Oban Ry.*, 25 S. L. R. 474.

(*d*) 8 & 9 Vict. c. 33, § 40, corre- (*g*) *Ib.* § 52.

intended that any one should be in attendance, or that the company should keep them fastened. It is rather assumed that the persons who may have occasion to cross the line, shall look after their own safety. On the other hand, it is the duty of the company in the construction of a new line to do nothing which is likely to prevent them taking care of themselves, and expose them to greater peril than is usually incident to a level-crossing. It is sufficient to aver and prove that the crossing was not safe, and that the train was not driven in such a way as to make it any safer (*a*).

The company is also bound by statute to fence the line as against the cattle of owners or occupiers of the adjoining lands (*b*). There is, however, no duty of fencing towards passengers. As regards them, their obligation is simply to take every reasonable care to prevent cattle straying on the line and proving a danger to the traffic. Nor is there any obligation to fence against cattle straying from another farm, and unlawfully, on the adjoining lands; and the owner of such cattle, when they get on the line, has no action against the company (*c*).

The right which a passenger has to be carried safely on a railway, does not depend on his having made a contract with the company, but the fact of his being a passenger casts on the company the duty of carrying him safely (*d*). As carriers of goods, they are insurers; as carriers of passengers, they are only answerable for negligence. If the accident be due to the line giving way, before some tempest of wind and rain of exceptional severity, the question of liability will depend on whether the line was originally constructed in such a manner as to be capable of resisting all the violence of weather which in the particular climate might be expected, although perhaps rarely, to occur (*e*).

(*a*) *Ireland v. N. B. Ry.*, 10 R. 53.

(*b*) *Monklands Ry. Co. v. Waddell*, 23 D. 1167; *Boston v. N.-E. Ry. Co.*, 662.

18 L. J. N. S. 795

(*d*) Per Jervis, C. J., in *Marshall*

v. York N. & B. Ry., 11 C. B. 655,

662.

(*e*) *G. W. Canada Ry. v. Braid*,

(*c*) *Ricketts v. East & West India Docks Ry. Co.*, 21 L. J. C. P. 201.

1 Moo. P. C. N. S. 101.

It is also required that the vehicles employed for the transit of the traffic are road-worthy; but, on grounds already explained, they are not liable for a defect, incapable of being guarded against in the process of building, and undiscoverable by any subsequent examination (*a*). And when the accident is due either to the imperfect accommodation provided at stations for the arrival or departure of passengers, or to the negligent driving of the train, as by the overshooting or stopping short of the platform, so that the passenger, thinking he has reached his destination, with due precaution, attempts to alight and is injured, the company are also liable (*b*). If the company plead contributory negligence on the part of the passenger, it is for them to establish it (*c*).

The fact that the passenger was travelling free does not exonerate the company (*d*). If, having to pass over two lines, the A line and the B line, in order to reach his destination, and he is injured on the line of the B company, through the latter's negligence, he may sue either the A company who sold him his ticket, or the B company as the immediate authors of the injury. Against the first, his action would be rested on the contract, whereby they undertook to carry him the whole distance with reasonable care and caution; against the second, on the duty which flowed from their letting him travel on the line (*e*).

The undertaking is that the line shall be in a fit and proper state, so far as it can be made so by *regulation*, for the safe carriage of the passenger. The company is liable for their plant, servants, signals, and the recognised appliances for securing safety. But they are not answerable for the fault of third parties, *e.g.* of another railway, with running powers over their line, leading to an accident (*f*). They do

(*a*) *Readhead, sup.*

(*e*) *Foukes v. Met. Ry. Co.*, L. R.

(*b*) *Potter v. N. B. Ry. Co.*, 11 4 C. P. D. 267, *affd.* L. R. 5 C. P. M. 664; *Foy v. London B. & S. C. Ry.*, 18 C. B. N. S. 225.

Blake, 7 H. & N. 987.

(*c*) *Potter, sup.* 670.

(*f*) *Wright v. Midland Ry. Co.*,

(*d*) *Gt. N. Ry. v. Harrison*, 10 L. R. 8 Ex. 137.

Ex. 379.

not engage that no cart shall cross the line at a level-crossing just as a train is passing; and, while it is their duty to take proper precautions to prevent cattle straying on the line, they cannot be expected to prevent this absolutely, any more than to keep a mischievous person from laying a log across the rails. It was therefore held that when, during the execution of certain works over the defenders' line, a heavy girder, through the carelessness of the contractor's men, fell on a passing train and injured one of the passengers, the company were not liable (*a*). The railway company, in fact, is not answerable for a mischief the occurrence of which they were not bound to anticipate, and take precautions against.

(*a*) *Daniel v. Met. Ry. Co.*, L. R. 5 H. L. 45.

CHAPTER VII.

COLLISIONS AT SEA.

Right to sue the Master.—By maritime law, the remedy of a vessel which has been injured through the fault of another vessel, is a remedy *in rem* against the ship itself, or against the master and owners personally. The Merchant Shipping Act of 1875 requires the managing owner to be registered, and if there be no managing owner, that somebody to whom the management of the ship is entrusted be registered as such (*a*). The master acts as his agent, and a creditor may sue both or either; but in any case, the registered managing owner is answerable to the public (*b*).

In Scotland the remedy *in rem* is not now of much importance, for since the abolition of the Admiralty Court, all maritime actions are tried before the sheriff or in the Court of Session, like an ordinary suit; and if the ship sought to be condemned is a foreigner, she is arrested *ad fundandam jurisdictionem*, and the action is then raised against the master "as representing the ship and owners" (*c*). The master is accepted as sufficiently representing his absent employers; and, to make the instance valid, it is not necessary that he should have any interest himself in the vessel. Actions may be instituted against him for the price of stores supplied for the ship's use; and an action of reparation founded upon delict is equally competent, whenever jurisdiction has been founded, by arresting the vessel as belonging to him in his representative capacity (*d*).

(*a*) 38 & 39 Vict. c. 88, § 4.

meister, 8 R. 642, per Lord Young,

(*b*) *Steel v. Lester*, L. R. 3 C. P. 646.

D. 121. See also *Meier v. Kürchen-*

(*c*) 40 & 41 Vict. c. 50, § 8.

(*d*) *Morison v. Massa*, 5 M. 130.

Principles of Responsibility.—The law applied by the Courts of this country to cases of injury at sea rests on two general principles—(1) That the owner of the ship is answerable for the negligence of the master and crew; (2) that it is the duty of those in charge of her, in port or on the high seas, to take care of the safety of others. Where this care was wanting, it has been held that an English telegraph company could recover from a foreign vessel damages for injury done by the ship's anchor to the cable lying at the bottom of the sea (*a*).

No cause of action arises unless some harm results to one or other of the vessels from their coming into contact, and the fact of the collision alone is no proof of fault. Some evidence of want of care and skill is indispensable; the burden of proof is on the complaining vessel, and, unless the collision itself is sufficient *prima facie* to put the colliding vessel in the wrong,—as when the ship run into was at anchor (*b*),—if the proof leaves the blame uncertain, the collision is treated as an accident—a *damnum absque injuria*—for which no action lies.

If two vessels run into each other, and one of them does damage to a third, they will be both liable to the latter if they were both to blame for the original collision; but if the owner of vessel A, in consequence of the wrongful act of the B, is compelled to take measures which drive her into the C, the A is not, but the B is liable to the C (*c*). So a vessel in a disabled state coming into collision with another was held answerable, on proof that her disablement was due to the fault of her own crew (*d*). Nor will the colliding vessel be excused by the fact that she was engaged in some meritorious service at the time, as, for instance, that she was rendering salvage assistance to another in distress, with which she came into collision (*e*).

(*a*) *Submarine Tel. Co. v. Dickson*,
15 C. B. N. S. 759.

(*d*) *Secombe v. Wood*, 2 M. &
Rob. 290.

(*b*) *The Annot Lyle*, L. R. 11 P. D.
114.

(*e*) *The C. S. Butler*, L. R. 4
Adm. & Eccl. 178.

(*c*) *The Thames*, 44 L. J. Ad. 23;
The Sisters, L. R. 1 P. D. 117.

Maritime Rule of Partition of Loss.—The rules of the Admiralty and common law agree in saying—(1) That where the collision is the fault of neither ship, each must bear its own loss; (2) when it is the fault of one of them only, the person to blame bears the entire loss; but (3) when both are to blame, the maritime law differs from the common law. The common law says that neither shall recover at all, and, as in the case of inevitable accident, the loss lies where it falls. The Admiralty law says, on the contrary, that if both contribute to the loss, it shall be brought into hotch-potch and divided between them (*a*).

Until the case of *Hay v. Le Neve* (*b*), which was an appeal from Scotland, there was a question among lawyers whether loss caused to both vessels from a collision should not be apportioned according to the degree of blame attaching to each. In the Court of Session, the judges imposed two-thirds of the loss on the ship most to blame, and one-third upon the other; but when the case reached the House of Lords, Lord Gifford, after consulting Lord Stowell, decided to follow the rule which had prevailed in the Admiralty Court and in the common law of England from the earliest times,—that damage resulting from common fault shall be considered common loss, and be borne by both parties equally. When there is great disparity in the amount of fault, or much difference in the value of the ships and their respective cargoes, the rule leads to curious results. We first ascertain the damage done to each vessel, then add it together, next divide the sum by two, and finally decree issues against the vessel which has suffered the least damage, but has to pay something to square the account (*c*).

Burden of Proof.—There is, however, no reason for saying that the rules of maritime law and the rules of the common

(*a*) Per Lord Stowell in *The Woodrop Sims*, 2 Dods. 83; per Lord Blackburn in *Cayzer v. Carron Co.*, L. R. 9 App. Ca. 873, 881.

(*c*) *The Khedive*, L. R. 7 App. Ca. 795, reversing *Chapman v. Royal Netherlands Steam Nav. Co.*, L. R. 4 P. D. 157.

(*b*) 2 S. App. 395.

law on the subject of fault differ in the slightest degree. "If it is two ships," says Lord Blackburn (*a*), "they are to be governed by the same rules of law and of evidence as if it was two carts in the street; but when you come to apply that, you must remember that a ship is a thing which cannot be stopped in an instant like a cart, and cannot be moved from one side to the other like a cart; and when you have to look out for miles instead of looking out for yards, the application of the rules becomes very different."

The onus of proof is governed by the rule that the complaining vessel must make out *prima facie* a case which, if unanswered, will entitle her to recover. As in collisions on land, much often depends upon the sufficiency of the reply and duply. When a vessel runs into one lying at anchor, the latter has simply to prove that she was at anchor, and was showing the proper light, as in that case it was the duty of the other to keep clear of her (*b*). It is now the turn of the colliding vessel to show how she came to run into the other. The defence may be unavoidable accident, such as a storm or *vis major*, rendering it impossible for her, with the utmost care, to avoid the collision. To this category we may refer such accidents as the catching of the chain on the windlass when the anchor was being let go (*c*); the parting of the cable in a gale of wind; the breaking of the steering gear from a latent defect (*d*); the giving way of a new apparatus which, on trial, was found to be useless (*e*); the breaking of the chain holding the buoy to which the vessel was moored (*f*). And when a vessel moored in the customary manner to a buoy in Glasgow Harbour carried away the buoy during a gale of unprecedented violence, and did much damage to shipping and property when careering before the wind, the owners were held free from blame (*g*). A loss of this kind is,

(*a*) *Cayzer v. Carron Co.*, *sup.* 882.

(*b*) *The Indus*, L. R. 12 P. D. 46. 99.

(*c*) *The Peerless*, Lush. 30; *The Pladda*, L. R. 2 P. D. 34.

(*d*) *The Virgo*, 3 Asp. Mar. Ca. 285.

(*e*) *The European*, L. R. 10 P. D.

(*f*) *The William Lindsay*, L. R. 5 P. C. 338.

(*g*) *Kidston v. Crauford*, 13 R. 342.

in the language of maritime law, said to be occasioned by the act of God,—meaning a loss arising from the agency of nature, which cannot be successfully guarded against by the ordinary exertions of human skill and prudence. So, where a mare died at sea during a passage from London to Aberdeen, partly owing to fright and partly owing to excessive bad weather, the Court held, in the absence of negligence on the part of the ship, that the shipowner was not liable (*a*).

Compulsory Pilotage.—Failing unavoidable accident, the defendant vessel may show that she had a licensed pilot on board, and that it was to his fault exclusively that the collision was due. Between the owner and the crew the relation is that of master and servant; but a pilot on board by compulsion of law is not the owner's servant, and when an accident occurs solely through his negligence, the owner is by statute not liable (*b*). The function of a pilot, however, is not of a very extensive character,—he gives the ship's course and regulates the navigation.

If she is a sailing vessel, he gives orders as to the shifting of the sails, but only because she could not be steered if he did not attend to the quantity and position of the canvas. But he cannot place a man on the look-out. He has nothing to do with the disposition and discipline of the crew, and his presence on board does not release the master from the duty of taking proper precautions to prevent danger. He is truly there simply to attend to the steering of the ship (*c*). But on evidence sufficient to raise a presumption of fault on the part of the pilot, the ship is not exonerated unless it is also shown that no one else was in fault. The burden of proof now shifts back to the complaining vessel, and it is for her to show that there was negligence on the part of the defenders or their servants, as well as the pilot, causing or contributing to the collision (*d*); as, for instance, by not keeping a proper look-out

(*a*) *Nugent v. Smith*, L.R. 1 C.P.D. L. R. 12 P. D. 46, 48; in *Guy* 423. *Mannering*, 51 L. J. Ad. 57.

(*b*) Merchant Ship. Act, § 388.

(*d*) *Clyde Nav. Co. v. Barclay*,

(*c*) Per Brett, M. R., *The Indus*, L. R. 1 App. Ca. 790; *The Indus*, *sup.*

so as to give the pilot the earliest notice of the approach of a vessel; if this be proved, the responsibility remains; if otherwise, the owners of the delinquent vessel are free (a).

If a ship is negligently sent to sea as regards hull and equipment, the owner is responsible for any injuries which may be the consequence, provided negligence on his part is established. An owner's obligation is not what is implied in a warranty of seaworthiness under a charter party, for in the latter case the shipowner contracts that the ship shall be reasonably fit for the voyage, not simply that he will do his best to make her so; and if in the course of the voyage the engine shaft or other part of the machinery gives way, even owing to a latent defect, the ship is liable to the freighter (b). But in a question with a third party he is only bound to use reasonable care in fitting her for sea. This includes the duty of attending to such things as that the coals taken on board are capable of raising a sufficient head of steam, and that there is no negligence on the part of any person who has been employed by the shipowner in connection with the construction, overlooking, or management of the ship (c). A vessel under weigh must also have a fair and sufficient crew to work her for the voyage; but when a new ship on her trial trip came into collision, she was excused for not having her proper complement of men (d).

Of primary importance in navigation is a good look-out, and a ship neglecting this precaution will not be allowed to say that, owing to the density of the fog, there was no need of a look-out (e). The greater the risk, the greater the need for the highest vigilance; and in a hazy night in a crowded part of the Channel, it has been held negligence to have only one man on the look-out at the bowsprit (f), just as it would be accounted neglect if a vessel lying at anchor were to fail to put

(a) *The Iona*, L. R. 1 P. C. 426; 377; *Steel v. State Line*, L. R. 3 App. Velasquez, 1 P. C. 494; *The Christina*, 7 Moo. P. C. 160.

(c) *The Warkworth*, L. R. 9 P. D. 20.

(b) *The Glenfruin*, L. R. 10 P. D. 103; *Lyon v. Mells*, 5 East 427;

(d) *Clyde Nav. Co. v. Barclay*, *sup.*

(e) *The Mellona*, 3 W. Rob. 7.

(f) *The Germania*, 3 Mar. L. Ca. 269.

Kopitoff v. Wilson, L. R. 1 Q. B. D.

out a second anchor in the face of a rising gale (*a*). Another rule is, that a vessel in bringing up must not give a foul berth to another already at anchor, but leave sufficient space for her to swing in the event of a sudden change of wind (*b*).

Rule of the Road at Sea.—Before the introduction of steam power, when our mercantile marine consisted of vessels of comparatively small tonnage, the rule of the road at sea was summed up in four propositions, which amongst all maritime nations had come to be regarded as generally binding, viz. :—

- (1.) A vessel in motion shall keep clear of a vessel at rest.
- (2.) Two vessels with the wind free shall each port the helm (keep to the right).
- (3.) A vessel going free shall give way to one close hauled, the latter keeping her course.
- (4.) When two vessels are close hauled on different tacks, the one on the port tack shall give way.

Some years ago the Board of Trade found it necessary, in order to prevent collisions at sea, to frame more specific regulations dealing with lights, and the course to be taken by ships meeting and crossing. These rules have been from time to time revised, and as they now embody the fruits of many years' experience, and have been adopted by every important maritime State on the face of the globe, they may be considered an International Maritime Code of universal obligation. The rule of the road is now thus expressed in Article 4 of the International Regulations for preventing Collisions, issued under order in Council, which came into force on 1st September 1884 :—

“When two sailing ships are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz. :—

“(*a*) A ship which is running free, shall keep out of the way of a ship which is close hauled.

“(*b*) A ship which is close hauled on the port tack, shall

(*a*) *The Sourabaya*, rep. on another point, *nom. Miller v. Powell*, 2 R. 976.

(*b*) *Main v. N. S. Ship Co.* (unrep.).

keep out of the way of a ship which is close hauled on the starboard tack.

“(c) When both are running free, with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other.

“(d) When both are running free, with the wind on the same side, the ship which is to windward shall keep out of the way of the ship which is to leeward.

“(e) A ship which has the wind aft shall keep out of the way of the other ship.”

The advantage which such a code as the above furnishes for the guidance of seamen is twofold. A vessel approaching another is informed beforehand both what she is to expect the other to do, and what she is herself to do. If, of course, one obeys and the other does not, the rule becomes a snare, and worse than nugatory. A master may think quite correctly that it may be wiser in the circumstances to do something else than is prescribed, but it is not intended that he shall have any discretion in the matter. Accordingly, it has been provided by the Statute 36 & 37 Vict. cap. 85, § 17, “that if in any case of collision it is proved to the Court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, *has been infringed*, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary.” If a local rule is in question, it has still to be shown that the infringement contributed to the accident; if it did not, it is irrelevant and immaterial (a); but in the case of the international rules, infringement imports an absolute presumption of culpability against the vessel guilty of such infringement, to which the Court is bound to give effect whatever the nature of the infringement may be. It is unnecessary for the pursuer to prove that the collision

(a) *Little v. Burns*, 9 R. 118.

was occasioned by the non-observance of the regulations (*a*). Simple departure from the rules constitutes fault—fault from which the offending vessel can only excuse herself by showing that the departure was unavoidable; failing this, the vessel guilty of infringement must share the blame of a collision which, so far as navigation is concerned, was exclusively the fault of the other (*b*). There is only one exception to the strictness with which this is enforced. “I am of opinion,” says Lord Justice Bowen, “that a departure from Art. 18 is justified, when such departure is the one chance still left of avoiding danger which otherwise was inevitable” (*c*). And in regard to all the rules, it is provided by way of saving clause, that in construing them due regard shall be had to the dangers of navigation, and to any special circumstances which may render departure from the rules necessary in order to avoid immediate danger. The rules apply to rivers such as the Clyde so far as they are not inconsistent with local regulations, and to all ships, large or small, decked or open, whose business it is to go to sea (*d*). Although the statute does not apply to the navy, regulations exactly the same have been issued by the Lords of the Admiralty (*e*).

Every nation having jurisdiction over the sea within three miles of its shores is entitled to regulate the traffic inside of this line in such a manner as may be most convenient for the passage of its commerce (*f*). The regulations therefore apply (1) to all British ships everywhere; (2) to foreign ships within British waters, and which must, while there, submit to the municipal law of the kingdom; (3) to foreign ships outside these limits belonging to a State which has

(*a*) *China Merchts. S. N. Coy. v. Bignold*, L. R. 7 App. Ca. 512, 516; 16, 19.

The Hibernia, 2 Asp. Mar. Ca. 454; (*d*) *Ex p. Ferguson*, L. R. 6 Q. B. 280.

The Fanny M. Carvill, L. R. 13 App. Ca. 455; *The Englishman*, L. R. 3 P. D. 18. (*e*) *H.M.S. Topaze*, 10 L. T. 659; *H.M.S. Supply*, 12 L. T. 799.

(*b*) Per Lord Chan. (Herschell) in *The Main*, L. R. 11 P. D. 132, 134. Lord Watson in *Cayzer v. Carron Co.*, 9 App. Ca. 873, 886. (*f*) *Gen. Iron Screw Colliery Co. v. Schurman*, 29 L. J. Ch. 877.

agreed to be bound by the rules. It has justly been said by the Supreme Court of the United States, that as it is of importance that an international code of this nature should be construed in the same sense, the decision of other maritime States will be ground for the adoption of a similar construction (*a*).

It has been frequently observed, that the object of the regulations is not so much to prevent collisions as to prevent "close shaving." If the rule of the road were always acted on in *time*, no two vessels would ever be so dangerously near as to render the risk of collision possible. Attention to this will be found to solve many knotty nautical questions. When, for instance, a vessel is directed "to keep out of the way of the other," every sailor knows that it is the easiest thing to do, provided the movement is begun in time. The whole danger arises from its being delayed until it is too late. Many nautical authorities accordingly hold that nothing short of a *vis major*, such as thick weather, or failure to show the proper light, should be any excuse for a vessel not keeping out of the way of another when it is her duty to do so.

The rules may be briefly divided into three sections—those applicable to night, to day, and to thick weather. At night every vessel is bound to show the lights specified—the object being to enable vessels as far as can be to obtain a knowledge of each other's position just as if it were day-time. When their position is ascertained in this manner, the other rules apply just as if it were daylight. But fog is the great peril of the mariner, and exact obedience is required to the rules for preventing accidents during this condition of the atmosphere, as well as such familiar precautions as the frequent sounding of fog signals, an efficient look-out, a very low rate of speed, just enough to keep the vessel subject to the helm, and a sufficient force at the wheel to effect if necessary a change in the vessel's position.

(*a*) Marsden on Collisions at Sea, 302.

Steamships — Tugs.—The leading rules as to steamers are :—

Art. 15. "If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

"This article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other. The only cases to which it does apply are when each of the two ships is end on, or nearly end on, to the other ; in other words, to cases in which, by day, each ship sees the masts of the other in a line, or nearly in a line, with her own ; and by night, to cases in which each ship is in such a position as to see both the side-lights of the other.

"It does not apply by day to cases in which a ship sees another ahead crossing her own course ; or by night to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead."

Art. 16. "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."

Art. 17. "If two ships, one of which is a sailing-ship and the other a steam-ship, are proceeding in such directions as to involve risk of collision, the steam-ship shall keep out of the way of the sailing-ship."

Art. 18. "Every steam-ship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."

It cannot be too much insisted on, that it is the duty of a steamer wherever there is risk, and whatever may be the conduct of a sailing vessel, to do everything that can be done

consistently with her own safety to avoid a collision (*a*). The reason is that a steamer is more completely under command than a sailing vessel, for she is practically independent of the wind. She can go ahead or astern as she pleases; and as soon as a ship and a steamer are moving on intersecting lines, the steamer is bound to watch most vigilantly, and adopt such timely measures as may be necessary.

A tug and tow are for many purposes considered as one, the moving power being in the tug, and the controlling power in the tow. It is essential for the common safety that there should not be divided command; and as the pilot (if there be one) takes his position on the tow, and the officers of the latter are superior in position to the men on board the tug, the general command of both belongs to the tow. This practice has received the sanction of many legal decisions, which establish the proposition that it is the duty of the tug to carry out the directions which she may receive from the ship in tow (*b*). The tug may render herself liable by a sudden departure from the safe course before the tow has time to interfere (*c*); but a towage contract implies that due diligence will be used by both not to increase the risks incident to the operation, or to imperil the safety of either. In a question with a third party, the tug being in the service of the tow, the tow is answerable for the negligence of her servant; and if in allowing the tug to take a wrong move at a critical time the tow is guilty of negligence, she will render herself liable (*d*).

There is no warranty implied in a towage contract that the tug is fit for the service, nor that she will take the ship to her destination. The tug's engagement is merely that she will use competent skill to do her best endeavour to perform the service (*e*).

(*a*) Per Lord Westbury in *City of Antwerp*, L. R. 2 P. C. 25, 30. (*d*) *Smith v. St. Lawrence Tow Boat Co.*, L. R. 5 P. C. 308; *Sinquasi*,

(*b*) *Spaight v. Tedcastle*, L. R. 6 App. Ca. 217; *The American and Syria*, L. R. 6 P. C. 127. L. R. 5 P. D. 241; *Niobe*, L. R. 13 P. D. 55.

(*c*) *The Stormcock*, 4 Asp. Ma. Co., L. R. 7 Q. B. D. 598. (*e*) *Robertson v. Amazon, etc. Tug*

Law Ca. 410.

It is the duty of a third ship to use extraordinary care and caution in approaching a ship towing another, for she is then in an encumbered and therefore unmanageable condition. If both tow and tug are to blame in a collision with a third ship, neither can recover damages against the other (*a*).

Damages.—In Admiralty cases the damages are assessed so as to afford complete restitution *in integrum*. The party who has sustained the damage by the collision is to be put as far as practicable into the condition he would have been in if no collision had occurred. The vessel is fully repaired at the wrong-doer's expense; and if this gives the owner more than his loss he gets the benefit, for no deduction is made on account of the increased value of the ship by the substitution of new for old materials. In the modern law of insurance, the loss sustained by the ship is estimated at two-thirds of the cost of repairs, which the underwriter pays, even if the result is that the ship is made more valuable when repaired than she was at the time of the insurance; but in the case of a collision, the owner recovers the whole loss, which includes that of a charter party (*b*).

If a ship proves a total loss, the owner recovers her market value at the time of the collision, with interest from that date. If she was under charter he receives with her value at the end of the voyage the freight which she would have earned; and if she was under an engagement which the collision disabled her from fulfilling, even if there was no regular charter party, there will be added to the value of the ship the loss caused by her being obliged to accept less beneficial employment (*c*). Loss of market is not allowed, for that is a mere expectation of profit—too speculative to enter into the calculation (*d*); but the loss from the interruption of a fishing voyage is included (*e*).

(*a*) *The Energy*, L. R. 3 Ad. & Ec. 48.

(*c*) *Argentino*, L. R. 13 P. D. 61.

(*b*) *Lohre v. Aitchison*, L. R.

(*d*) *Parana*, L. R. 2 P. D. 118.

3 Q. B. D. 558; *Star of India*, L. R.
1 P. D. 466.

(*e*) *The Resoluto*, L. R. 8 P. D.

If a vessel injured in a collision is not sunk, but subsequently lost, and goes ashore, it is for the delinquent vessel to prove that the whole loss was due to some other cause than the collision. *Prima facie*, the presumption is that it was all the consequence of the one occurrence; but it is the duty of those on board of her to stand by her and use due diligence in lessening as far as practicable the injurious consequences of the collision; and if it should appear that subsequently she was unjustifiably abandoned, the vessel which caused the collision is not liable as for a total loss (a).

Subrogation.—A wrong-doer is not entitled to plead that the person injured, being insured, will be sufficiently compensated by the insurance money. An insurance is a contract of indemnity whereby the “risk” or life accepted is to receive a given sum of money on a certain event in consideration of paying a certain premium. What entitles him to the payment is not the accident, but the contract into which he has entered, conditional on a given contingency. Full damages are therefore recovered in every case of delict whether he is insured or not. He keeps the benefit which he has paid for, in addition to the damages to which he is entitled on account of the defender’s negligence (b). But while this is so as between the wrong-doer and the person injured, an equity arises as between the insured and the insurer. The contract of insurance is one of indemnity only; and he whose ship has been run down must not “take with both hands.” If he has the means of diminishing the loss, he is bound to use the means, or let the indemnifier use them, who then will have so much less to pay. This right, which is termed *subrogation*, is common to fire insurance, marine insurance, accident insurance, and every contract of indemnity. The insurer is put in the place of the assured as regards all his rights and remedies against the wrong-doer. The action is brought in the name of the shipowner or the assignee, whether the loss is total

(a) *The Mellona*, W. Rob. Rep. 7. 5 M. 848; *Bradburn v. Gt. West. Ry.*,

(b) *Morison & Milne v. Bartolomeo*, L. R. 10 Ex. 1.

or partial, with this difference, that if it is partial the right of the underwriter is limited to the sum he has paid; if the vessel has been abandoned, as for a total loss, he may recover the entire interest,—for by the cession of the ship the owner has given up the entire property, together with every benefit and advantage belonging or incident to it (*a*). But when two ships came into collision, being the property of the same owner, the underwriters were not allowed, in the exercise of this right of subrogation, to sue the vessel in fault for damages; for as the right must be asserted in name of the assured, it could not be maintained against himself (*b*). So, when a vessel was sunk by the Confederate cruiser *Alabama*, and the owners of the cargo were indemnified by the underwriter to a valued amount, which was less than the real value, the underwriter having afterwards claimed the indemnity which had been voted by the Government of the United States, it was held that as it had been voted as a free gift on condition that underwriters were excluded from the benefit, the claim could not be sustained (*c*).

The cargo on board a vessel at the date of the collision is never liable for damage caused, even although it belonged to the owner of the vessel, except for life salvage. The award of a sum in respect of the preservation of life has only been given since 1854 (*d*); and it has been held that when specie is saved along with passengers from the vessel which subsequently goes to the bottom, it is subject to payment of life salvage, and the owners of the ship are not liable to contribute (*e*).

Cargo is usually carried under a bill of lading, which binds the carrier to carry with reasonable care—certain events, including perils of the sea, excepted. A peril of the sea has been defined “sea damage occurring at sea, and nobody’s fault.” Foundering caused by collision with another vessel, when that

(*a*) *Stewart v. Greenock Marine Sea Insurance Co. v. Hadden*, L. R. Ins. Co., 2 H. L. Ca. 159. 13 Q. B. D. 707; *Castellain v.*

(*b*) *Simpson & Co. v. Thomson, Preston*, L. R. 11 Q. B. D. 380. L. R. 3 App. Ca. 279. (*d*) Under 17 & 18 Vict. c. 104,

(*c*) *Burnand v. Rodocanachi*, L. § 459; 24 Vict. c. 10, § 9. R. 7 App. Ca. 333. See also the (*e*) The cargo *ex Sarpedon*, L. R. following cases on subrogation:— 3 P. D. 28.

other is solely to blame, is within the exception (a); but if the carrying ship is also to blame, she remains liable as for a breach of the covenant to carry safely.

Limitation of Liability.—Under the Merchant Shipping Acts, the liability of shipowners for injuries by the “improper navigation” of the vessel, in the absence of any fault on their part, suffers the following limitations:—

(1.) In respect of loss of life or personal injury alone, or together with damage to the vessel, boats, goods, or other things, the liability shall not exceed in the aggregate £15 per ton.

(2.) In respect of loss and damage to ships, goods, merchandise, and other things (whether accompanied or not by loss of life and personal injury), the liability is limited to an aggregate amount not exceeding £8 per ton.

When £15 per ton is paid into Court, the life claimants are paid out a sum equal to £7 per ton, and they and the goods claimants rank *pari passu* against the balance, representing £8 per ton (b).

These limitations extend to British as well as foreign vessels; but notwithstanding the payment into Court of the statutory sum, the shipowner is bound to deliver up every part of the cargo which he may have recovered from the wreck, and has no claim on it for any part of the expenses of raising the ship and cargo (c).

The words “improper navigation” are not to be restricted to the negligent navigation of the vessel by the master and crew. They include damage wrongfully done by one ship to another in the course of a voyage, which is due to the negligence of any person for whom the owner is responsible, *e.g.* the stevedore in loading the ship, or the fault of a mechanic in inserting a defective pin in the steering-gear while the ship is being overhauled in dock, which made her steer so badly as to bring her into collision (d).

(a) *Wilson v. Xantho*, L. R. 12 App. Ca. 503. (c) *The Ettrick*, L. R. 6 P. D. 127.

(b) *The Victoria*, L. R. 13 P. D. 125. (d) *The Warkworth*, L. R. 9 P. D. 20, 145.

The liability of the owner remains untouched when he is the actual wrong-doer. For instance, an owner navigating his own ship is not protected. The limitation only applies when the ship is in charge of a master and crew of his appointment.

When a shipowner has settled out of court some of the claims in respect of a collision for which the ship is in fault, he is entitled in a petition for limitation of liability to take into account the amounts previously paid to the claimants, settled with extrajudicially, but no more than the sum which they would have recovered had there been no such settlement (*a*).

An owner is not bound to raise a ship sunk in collision; and if she proves a danger or obstruction to the navigation, she may be removed by the Harbour Authority under the Removing of Wrecks Act, 1877 (*b*).

The Admiralty rule as to dividing the loss, when both vessels are to blame, does not apply when a claim is made by a passenger for injury caused by a collision; and it has now been held that although one of the crew cannot sue, he being one of those who were to blame, an engineer or other person who had nothing to do with the collision is in a different position. He cannot recover as against his own ship, the accident being due to the fault of a co-servant, but he may recover as against the other ship (*c*).

Fishing-Boats.—By the Sea Fisheries Act, 1883 (46 & 47 Vict. cap. 22), parliamentary sanction was given to an International Convention between Great Britain, Germany, Belgium, Denmark, France, and the Netherlands, regulating the police of the fisheries in the North Sea outside territorial waters. For the purposes of the Act, the 61st degree of north latitude is made the northern boundary of the North Sea; and as regards our own fishermen, the principal regulations which, under the several Fishery Acts, fall now to be observed by them in

(*a*) *Rankine v. Raschen*, 4 R. 725. (*b*) 40 & 41 Vict. c. 16, § 4, 6;
See also *Miller v. Powell*, 2 R. 976; *Dormont v. Furness Ry. Co.*, 11 L. R.
Burrell v. Simpson, 4 R. 177, 1133; Q. B. D. 496.
Carron Co. v. Cayzer, 13 R. 144. (*c*) *The Bernina*, L. R. 12 P. D. 58.

fishing on the Scottish coast, within or without the territorial waters, are to the following effect:—

Lettering, etc.—All sea fishing-boats must be registered, lettered, and numbered, in accordance with the rules and regulations for the respective classes.

The certificates of registry must be kept on board the boat at all times (save when laid up), and must be produced annually for indorsation to an officer of Customs, Coastguard, or of the Fishery Board for Scotland.

The name of the boat and the port she belongs to must be painted on the outside of the stern, and the letters and numbers on the outside of each bow, and on each side of the principal sail above the close reef points. No other marks are allowed by the Convention on the outside of the hull or on the sails.

Small boats, buoys, and all fishing-gear or implements must be marked in legible characters with the letters and numbers of the boat to which they belong; but owners of nets and other fishing implements may further distinguish them by any private marks they think proper.

The letters and numbers of a boat must not be covered or concealed in any way.

Fishing Operations.—No boat must anchor between sunset and sunrise on ground where drift-net fishing is actually going on, except under compulsory circumstances.

No boat may shoot her nets or lines so as to interfere with the operations of another boat which has already commenced fishing.

The boat which has last shot her nets or lines will be responsible for any damage she may do to a boat (or its gear) which had shot previously, unless it is proved that it was under compulsory circumstances, or that the damage was not caused by their fault.

When nets or lines belonging to different fishermen get foul of each other, they must not be cut without the consent of both parties, unless they cannot be otherwise disengaged; and lines so cut under stress of compulsory circumstances

must be immediately joined together again. The same has to be done with nets.

No boats shall be made fast to the nets, lines, or fishing-gear of another fisherman.

No fisherman shall, under any pretext whatever, cut, hook, or lift up nets, lines, or other fishing-gear not belonging to him, except in the cases of salvage and of fouling of nets and lines above referred to.

Salvage.—All wreck or fishing-gear, marked or unmarked, picked up at sea, must be delivered to the proper authority at the first port touched at by the salving boat. This applies to all fishermen in the North Sea outside the territorial waters; and when any such wreck or fishing-gear is picked up elsewhere by British fishermen, it should be immediately reported to the proper authority, who will give directions as to its disposal.

Trawling Vessels.—Trawlers are required to use every precaution to avoid doing damage to the nets or lines of other boats, and are held responsible for any loss sustained, unless they can prove that it did not result from their fault. The effect of this is to create a presumption against the trawler, and to throw on her the burden of proving that she was *not* to blame.

Signal Lights.—Masters of sea fishing-boats are bound to be careful in complying with the rules of the road at sea, and carry and exhibit such lights only as are authorized by the Board of Trade.

Masters are by law held responsible for the acts of all persons belonging to their boats.

Complaints.—Complaints for damage sustained to boats or fishing-gear may be made to the following officers, viz.:—The commanders of superintending vessels; officers of Custom House and Coastguard; the commanders of fishery cruisers; and the officers of the Fishery Board for Scotland; who will, if required by both parties, fix the amount of compensation due for any damage done to another fishing-boat, or property belonging thereto.

The procedure is prescribed by the Sea Fisheries Scotland Amendment Act, 1885, which in effect constitutes the fishery officer a statutory referee, to settle the damage. In any action raised for its recovery his report is to be accepted as final as to the *quantum*; and unless the Court shall consider it necessary to do full justice in the case, no further evidence is to be received. Damages may also be awarded by the sheriff who tries an offence under the Act by way of compensation for the injury which may have been caused by its contravention (*a*).

(*a*) 48 & 49 Vict. c. 70.

CHAPTER VIII.

FRAUD.

ONE who has been cheated in a transaction has a choice of remedies—an action rescissory to set aside the contract; *exceptio doli* as a plea against its enforcement; and an action of damages to recover his loss.

Fraud or *dole* is susceptible of such endless disguises as to be hardly capable of definition. Erskine (a) is content to call it “a machination or contrivance to deceive,” and the “Code Civil,” which is justly respected for the strict accuracy of its definitions, is satisfied with the statement “that fraud is a ground for avoiding a contract when the devices (*les manœuvres*) practised by one of the parties are such as to make it evident that without these devices the other party would not have contracted” (b). But whatever difficulty there may be in expressing within the compass of a phrase what amounts to fraud or deceit, there is no dispute that if no damage follows there is no cause of action. No wrong is done if nobody has been taken in; and if—although at first successfully imposed upon—the person deceived discovers the truth, and “get at the fact concealed before he sign the contract, the misrepresentation and concealment go for just absolutely nothing” (c). Hence, to establish a case of fraud the following points require to be proved:—that a certain statement was made; that it was false; that the author did not believe it, or had no right to believe it; that it was made

(a) Inst. iii. 1. 16.

(b) Code Civil, art. 1116.

(c) Per Lord Brougham in *Irvine*

v. *Kirkpatrick*, 7 Bell's App. 186, 237.

for the purpose of being acted on; that it was so acted on; and that damage was the consequence.

To establish a fraud it is not necessary to prove that the statement was addressed individually to the person who was in fact misled. If it is addressed to the public at large, it is addressed to every individual whom it reaches; if to a class, it is the same as if it had been separately posted to each member of the class. Although the reports of public companies are primarily issued to the shareholders, they are understood to be for the benefit of all who may desire information as to the undertaking, and therefore the directors are responsible to the purchaser who has acquired his shares upon the faith of statements contained in the reports which are afterwards found to be erroneous.

Materiality of Falsehood.—To warrant the above inferences much may depend on the materiality of the representation. If it was obviously material, the natural inference is that it had its influence on the pursuer, and caused the prejudice of which he complains. If the materiality is not obvious, the pursuer may show by other evidence how it operated in deceiving him; and it is always relevant for him to show that he understood it in a certain sense; for if it is so ambiguously expressed as to be capable of two meanings, one false and the other true, no blame can be attached to the pursuer for putting on it the wrong construction. Persons sometimes try in this way to get the benefit of a fraud without incurring the responsibility; but it is for them to prevent misunderstanding by the use of language which admits of no dubiety. Further, a truth may be expressed in a form so fragmentary and imperfect as really to be an untruth, and to constitute an inducement to enter into a contract which is considered fraudulent. If, therefore, the statement in fact deceived the pursuer, and if the jury are satisfied that it was calculated to deceive him, further evidence of fraudulent purpose is unnecessary (*a*).

(*a*) In *Redgrave v. Hurd*, L. R. 20 Ch. D. 1, the late M. R. (Jessel)

If the pursuer gives evidence to this effect, it is for the defender to rebut it, by showing that he was already acquainted with facts contrary to the representation, or that he placed no reliance upon it. But it is not sufficient for this purpose to show that he had the means in his own hand of testing the accuracy of the information which was given to him. A man convicted of falsehood cannot charge his adversary with having been too trustful, and that instead of believing him he should have doubted and inquired further; the representation once made relieves the party of investigation, even if the opportunity is afforded (*a*). The opposite rule would offer too many advantages to the method of fraud, which consists in half showing the truth without making a full disclosure.

A common instance of this occurs in the launching of new companies. The promoters must specify in their prospectus the contracts which the intended company is to take up (*b*); but if their true nature is disguised, it is not enough for them, when challenged with the deceit, to defend themselves by saying that they were to be seen at the office of the solicitors. It has always been held that persons who accept these false statements as true, were not deprived of their remedy merely because they neglected to go and look at the actual documents. The case of *Rawlins v. Wickham* (*c*) is a strong illustration of this principle. There, a person who had been induced by false representations to enter into a partnership, and only sought to be rid of it after he had

said that when a material representation is made to induce a man to enter into a contract, followed by his so entering into it, the inference that he was induced to do so by the representation is an inference of law; but Lord Blackburn has remarked that it is simply an inference of fact, which may or may not be drawn by the jury, for its weight as evidence must greatly depend upon the degree to which the action of

the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act. *Smith v. Chadwick*, 9 App. Ca. 187, 196. See also Bowen (L. J.), opinion, 16. *Smith v. Land and House Property Co.*, L. R. 28 Ch. D. 7.

(*a*) Per Baggallay, L. J., in *Redgrave v. Hurd*, *sup.* 23.

(*b*) 30 & 31 Vict. c. 131, § 38.

(*c*) 3 De G. & J. 304.

been in practice for four years as a principal of the firm, although all the time he had been in possession of the means for investigating himself, was held not to have deprived himself of the right to be restored against the fraud.

In accepting an offer a man may have had two inducements—one a mistake of his own, the other a mistake induced by the deceit practised on him, and the two together constitute the determining motive of his conduct. But that he was labouring under some other error is irrelevant if the representation contributed the weight which turned the scale, and induced him to act in a particular direction (*a*).

Statement must be of Fact, not Opinion.—The question put to the jury is, “Whether the pursuer was induced to execute the contract by false and fraudulent representations made by the defender, or A. B. on his behalf?” The thing misrepresented must be a *fact*. There is a broad distinction between a statement of fact and a statement of opinion. No man is accountable for an estimate, or for indulging in exaggerated expectations of success; and when the facts are equally known to both sides, a mere expression of opinion is taken for what it is worth. But when the object is to give information to another seeking it, a statement, in form an expression of opinion, may in reality be dealt with as a representation of fact, for by implication it amounts to an assurance that he, being fully informed, is in possession of facts which justify the opinion. An hotel offered for sale was represented to be let to a “most desirable” tenant, the fact being that he had often been in arrear, and had paid his last quarter’s rent only by instalments after pressure; the sale was set aside, because the opinion given of the tenant amounted to a misdescription of a fact within the seller’s own knowledge (*b*). Cases raising such a point as this often approach the dividing line between warranty and misrepresentation.

(*a*) *Edgington v. Fitzmaurice*, L. R. 29 Ch. D. 459.

(*b*) *Smith v. Land and House Cor.*, *sup.*

In the numerous cases which have occurred of late years, in which parties have sought to get rid of their connection with unfortunate undertakings on the ground of the deceitful character of the prospectus, it has been held that misleading statements relating to the extent of the property of the company (*a*), the probable cost of the undertaking (*b*), the amount of capital subscribed, the money which had been spent in improving a property, and the existence of a binding contract for the purchase of part of it (*c*), the persons who have agreed to be directors (*d*), the objects to which the money proposed to be raised was to be applied (*e*), and the like, were sufficient to set aside the contract into which the party seeking relief had entered.

The Falsehood which is Fraudulent.—In a statement made honestly, the author affirms that he believes it; and whenever he does so believe it, and had reasonable grounds for his belief, there is no fraud (*f*). Every case of fraud thus turns on the question whether the defender believed the statement to be true; and this cannot be affirmed—

- (1.) When he knew the fact alleged to be untrue.
- (2.) When he did not know whether it was true or untrue.
- (3.) When, believing it to be true, he forgot a fact that it was his duty to have known or remembered, and which was inconsistent with his belief.

The law now holds a statement to have been made fraudulently, not only when the author knows it to be untrue, but when, not knowing or not caring whether it is true or untrue, he makes it recklessly for the purpose of influencing the conduct of another. In either case he is guilty of deceit both in law and morals, for by the very act of asserting as a fact what turns out to be no fact, he affirms

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| (<i>a</i>) <i>Keese River Silver Mining Co.</i> | (<i>d</i>) <i>Smith v. Chadwick, sup.</i> |
| <i>v. Smith</i> , L. R. 4 H. L. 64. | (<i>e</i>) <i>Edgington v. Fitzmaurice</i> , L. |
| (<i>b</i>) <i>Central Ry. Co. of Venezuela</i> | R. 29 Ch. D. 459. |
| <i>v. Kisch</i> , L. R. 2 H. L. 99. | (<i>f</i>) <i>Western Bank v. Addie</i> , L. |
| (<i>c</i>) <i>Ross v. Estates Investment Co.</i> , | R. 1 Sc. App. 145. |
| L. R. 3 Eq. 122. | |

that he is possessed of definite knowledge on the subject which is false and misleading (a).

The case of *Dobbie v. Johnston* was an action of damages brought by a shareholder of the Edinburgh and Glasgow Bank against two of the directors, for inducing him to buy his shares by means of false and fraudulent representations regarding the position of the bank (b). The Lord Justice-Clerk (Ingليس), who tried the case, directed the jury, that to entitle them to return a verdict against the defenders, they must be satisfied (1) that the representations were untrue; (2) that the defenders knew them to be untrue, or believed them to be untrue, or made the representations without believing them to be true; (3) that the representations were made for the purpose of deceit; and (4) that the pursuer was induced thereby to purchase the shares in question. The jury found that the representations were false, but declined to affirm that they had been made fraudulently, and the verdict was entered for the defenders.

It is never easy in such a case as the above to induce a jury, without very distinct evidence, to affirm that a false statement was made "for the purpose of deceit," i.e. intending to deceive; and, according to the recent cases, this is not one of the points which the pursuer has to establish to entitle him to recover. "A man," says the late Master of the Rolls (Jessel), "may issue a prospectus, or make any other statement, to induce another to enter into a contract, believing that his statement is true and not intending to deceive; but he may, through carelessness, have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions and did not intend to defraud" (c).

In other words, it is the duty of a man to refrain from

(a) *Peek v. Gurney*, L. R. 6 H. L. 377; *Smith v. Chadwick*, *sup.*; *Weir v. Bell*, L. R. 3 Ex. D. 238; *Edgington v. Fitzmaurice*, *sup.*

(b) 21 D. 624, 23 D. 1139.

(c) *Smith v. Chadwick*, *sup.* 44.

making a statement calculated or intended to influence the conduct of another, unless he thinks he knows it to be true; and to entitle him to say so, he is bound to show that he had reasonable grounds for his so thinking. It is not enough for him to say that he believed it; he must go further, and show that the evidence before him justified his belief. For the belief which will exempt him from the responsibility of propagating a falsehood must be a *bona fide* one; and as Lord Chelmsford said in the case of *The Western Bank v. Addie (a)*, how is his *bona fides* to be tested except by considering the grounds of his belief? It was on this ground that the House of Lords upheld the direction of the Lord President in the above case, that if the defenders (the Directors of the Bank) had no reasonable grounds to believe the statements which they had put forth concerning the position of the bank, that would be a misrepresentation and deceit.

In the great majority of cases, the evidence on which the defender proceeded will consist of facts collected by himself or communicated by others. The matter is probably wholly beyond his own experience, in which case he must necessarily take the assistance of others; and if he has been himself deceived by his informants, there is no legal ground for holding him civilly or criminally responsible—provided it is clear that in prosecuting his inquiries he proceeded in the manner usual amongst men of business, and with an honest desire to inform himself of the truth. He does not warrant the accuracy of the statement, he only warrants his belief in it; and any inaccuracy into which he may inadvertently have fallen, not accompanied by facts tending to show that he wilfully shut his eyes to other sources of information, is no evidence of *mala fides*. It is no part of the business of a bank director, for example, to keep the books or make up the balance-sheet; that is the duty of the auditor, the bank manager, and the salaried officials; and to hold him responsible for their mistakes or frauds is going beyond what justice warrants. He must trust to the salaried officials

of the corporation, just as in his private business he trusts to his own clerks—the only difference being that while between himself and the latter the relation is that of principal and agent, the relation between a director and another employe of a public company is not. Again, when the question is whether a certain property contains minerals, the proprietor must be largely guided by professional opinion. He is not an engineer himself, and if he employs a competent person to make the investigation, he fulfils his duty.

But supposing the facts to be true, the further question may arise, Were they sufficient to justify the inference which the defender drew from them? Here it must be remembered that the Court or jury charged with the duty of testing his *bona fides* are not to review his judgment with the strict scrutiny of a Court of review. Very likely they might, on the same facts, have come to an altogether different conclusion; but, as Lord Cranworth has remarked, “I cannot think that a person can be guilty of fraud because other persons think, or the Court thinks, or your lordships think, that there was no sufficient ground to warrant the opinion which he had formed” (a). False reasoning will never amount to *culpa*—the mistake made must be obvious and palpable, such as occurred in *Peck v. Derry* (b), where the directors of a Tramway Company announced that they “were *empowered* to use steam power,” when in fact the Act incorporating the Company authorized animal power only, unless the consent of the Board of Trade (which the directors honestly thought would be got for the asking) was obtained to the substitution of mechanical or other power.

It is enough to make a director responsible for a false prospectus that he received and circulated copies of it, and it is no defence that he was not present at the meeting which sanctioned its issue (c).

Fraud of an Agent.—No one can avail himself of what has

(a) *Western Bank of Scotland v. Addie*, *sup.* 168.

(b) L. R. 37, Ch. D. 541.

(c) *Peck v. Derry*, *sup.*

been obtained by the fraud of another unless he is not only free from the fraud himself, but has given some valuable consideration for it. A familiar illustration is found in the reduction of settlements,—which are set aside *in toto* when obtained by fraud, even when they confer large benefits on persons who had no concern in its perpetration. The reduction of deeds granted by bankrupts in favour of a creditor or class of creditors at the expense of the general body is another instance,—the deed is set aside, as a general rule, even although the receiver is not chargeable with complicity (*a*). The rule is also applied as between principal and agent, when the principal is innocent and the agent not. The principal is liable for his agent's act, and the agent is liable also. Indeed, "all persons concerned in the commission of a fraud are to be treated as principals; no party can be permitted to excuse himself on the ground that he acted as the agent or as the servant of another" (*b*), much more when the agent himself derives benefit from the fraud. But if the agent, again, employs a sub-agent,—if, for example, the directors of a company employed brokers, they would not, generally speaking, be answerable for false statements made by them without their authority,—not as their agents, but as agents of the company (*c*).

A master is liable for his servant's fraud, because, says Mr. Justice Willes, no "sensible distinction can be drawn between the case of fraud and the case of any other wrong" (*d*). But the judgment has been considered unsatisfactory. The liability rather seems to be that of principal and agent, and to rest on the principle which renders a firm liable for the fraud of a partner, a joint-stock company for the fraud of its manager. And Lord Bramwell said that the case, although rightly decided, ought to be put on its true ground. "I

(*a*) *M'Cowan v. Wright*, 15 D. 494.

(*c*) *Weir v. Bell*, L. R. 3 Ex. D. 238.

(*b*) Per Lord Chan. (Westbury) in *Cullen v. Thomson*, 4 Macq. 424, 432.

(*d*) *Barwick v. English Joint-Stock Bank*, L. R. 2 Ex. 259, 265.

think" (he says) "that every person who authorizes another to act for him *in the making of any contract*, undertakes for the absence of fraud in that person in the execution of the authority given as much as he undertakes for its absence in himself when he makes the contract" (a).

If loss comes to another through one who has been employed to represent you in the performance of a certain business, equity requires that the loss should fall upon him by whom the guilty agent was accredited and trusted. Let the hand receiving the benefit be ever so clean, if it comes through a polluted channel, the obligation of restitution follows. An employer who has obtained the benefit of a sum of money raised by the fraud of his clerk from a bank, is liable to the bank in repetition (b).

Of two innocent parties who suffer from the fraud of a third, the loss falls on the one who has furnished the means or afforded facilities for the fraud being committed. A man executes a bond and disposition in security over his property, and leaves it with his agent that he may get the money and pay it over to him. The agent borrows from another client and puts it in his pocket, the result being that the property is burdened with a debt for which the owner never received any consideration (c). The Court declined to shift the loss. So, where certain jewellery had been delivered on the contracts of "sale and return," and then fraudulently pledged, the loss was thrown, not on the pawnbrokers, but on the jewellers who had vested the wrong-doer with the symbol of property, namely possession, and so facilitated the fraud (d).

Are Damages recoverable if Contract unrescinded?—"There

(a) Per Lord Bramwell in *Weir v. Bell*, *sup.* 245.

(b) *Clydesdale Banking Co. v. Paul*, 4 R. 626; see also *Traill v. Smith's Trs.*, 3 R. 770; *Gibbs v. B. L. Co.*, 4 R. 630; *Eyre v. Burmester*, 33 L. J. Ch. 652; *Nat. Exch. Co. of Glasgow v. Drew*, 12 D. 950.

(c) *Rose v. Spavens*, 7 R. 925.

(d) *Brown v. Marr*, 7 R. 427; *Babcock v. Lawson*, L. R. 4 Q. B. D. 394; *Pochin & Co. v. Robinows & Marjoribanks*, 7 M. 622; *Vickers v. Hertz*, 9 M. (H. L.) 65; *Traill v. Smith's Tr.*, 3 R. 770.

is no doubt," says Lord Cairns, "that according to the law of England, a person purchasing a chattel or goods concerning which the vendor makes a fraudulent misrepresentation may, on finding out the fraud, retain the chattel or the goods and have his action to recover any damages he has sustained by reason of the fraud" (a). There is no distinct authority to the effect that the law of Scotland is the same, and it has been objected that to recognise any such right in the defrauded creditor would in effect be introducing the *actio quanti minoris*, which has been rejected in Scotland. The objection, however, does not seem to be well founded. The plea of *actio quanti minoris* is a bar to abatement of the price, and, as Lord Kinloch has pointed out (b) in the proper legal sense, only applied where both parties were in good faith. In an old case (c) it was laid down that if no fraud be alleged, the purchaser dissatisfied with the price which he had agreed to pay must either abandon the purchase altogether or be content with what he had got. But where fraud is distinctly averred, that principle has no application. There is no reason why a fraudulent seller should not be compelled in the option of the purchaser either to take back the article and repay the price, or let the purchaser keep it and restore that part of the price which, but for the fraud, would not have been paid. The money is the price of his fraud, and he ought not to retain it. To hold that the only remedy for fraud connected with, say a subordinate part of a complicated piece of machinery like the boiler of a large steamship (which was Amaan's case), is the rescission of the entire contract, would be giving the fraudulent seller a benefit instead of laying on him a penalty. To these views Lord Kinloch expressed his adherence in the later case of *Dobbie v. Duncanson* (d), and the law as so stated has the support of Lord Curriehill and Lord Colonsay in *Graham v. Western Bank* (e). A contract induced

(a) *Houldsworth v. City of Glasgow Bank*, L. R. 5 App. Ca. 317, 323.

(c) *Gray v. Hamilton*, M. Sale App. No. 2.

(b) *Amaan v. Henderson*, 3 M. 526.

(d) 10 M. 810, 815.

(e) 3 M.

by fraud is not void but voidable in the option of the person deceived; and keeping this in view, and as between two parties, the one innocent the other guilty, it is surely for the former and not the latter to dictate the manner in which the wrong shall be redressed. The point, however, has never been expressly decided.

Concealment—is a neglect to communicate that which the party knows, and was in duty bound to communicate. Whenever a duty of disclosure exists, the non-communication of a fact—be it by accident or design—voids the contract. This duty of disclosure varies with the nature of the contract, the relation subsisting between the parties, or the circumstances in which they may happen to be placed with regard to the means of information as to the subject-matter of the treaty. An example of the first case will be found in the contract of insurance. A party seeking to effect an insurance, knowing, as he does, better than any one else, everything connected with the subject to be insured and the risk to be incurred, makes his proposal on the implied understanding that the insurer may implicitly rely, not only that his statement will be accurate in every respect, but that it will embrace every material fact within his knowledge, or the knowledge of those with whom he has placed the underwriter in communication for the purpose of negotiating the business (*a*). He is therefore expected to make a clean breast of all he knows on the subject; and any failure to communicate a fact materially affecting the risk undertaken, however innocent the overlook, will void the contract. Even doubtful rumours (*b*), which the shipowner may not himself believe, require to be disclosed; and should he obtain further information subsequent to the application, but before the policy is underwritten, it is his

(*a*) *Sibbald v. Hill*, 2 Dow 263; 14; *Murison v. Gibbon*, 18 Jan. *Lynch v. Dunsford*, 14 East 494; 1811, F. C.; *Allan v. Young, etc.*, 24 *Blackburn, Low, & Co. v. Vigors*, L. June 1803, F. C.; *Bowker v. Smith*, 9 Feb. 1810, F. C.; *Kinloch v. Campbell*, 14 June 1815, F. C.

R. 12 App. Ca. 531.

(*b*) *Stewart v. Dunlop*, 3 Pat. App.

duty to communicate it at once to the underwriters. Failing to do so, it is not for him to say that all the circumstances, so far as known to him, were fully stated at the time when the risk was accepted (*a*).

Again, cautionary is a contract in which an unusual degree of reliance is placed by the cautioner on the statements of the person for whose behoof he consents to interpose. The contract bears a great resemblance to the contract of insurance, inasmuch as both have for their object a prospective guarantee against a possible loss; but while in the one the person to be indemnified is necessarily he at whose request the contract is made, in the other the debtor is the person served, and the creditor may know nothing of the representations on the faith of which the cautioner has consented to become bound. While, therefore, it is incumbent on the debtor to inform the cautioner fully and explicitly of his circumstances, and of every matter which may affect the risk undertaken, it must be remembered that it is to the creditor and not the debtor that the surety is bound; consequently, it is only when the fraud is practised with the creditor's privity that the cautioner is discharged (*b*). But, on the other hand, if information is asked, it must be faithfully given; and, in the same way, should the lender gratuitously interfere, he ought either to tell all or nothing at all (*c*). Nay, without directly interfering in the negotiation between the cautioner and the debtor, the creditor may render himself responsible by simply holding out the debtor as trustworthy, when in reality he is not. If they know that the circumstances of the debtor are such as to render the cautioner's obligation unusually hazardous, they ought to mention them to the cautioner, in order that he may execute his bond with his eyes open.

The law does not oblige the seller to point out all the defects in the article forming the subject of sale because it

(*a*) *Grieve v. Young*, M. 7086; (*c*) *Royal Bank v. Ranken*, 6 D. 1418.
Scougal v. Young, M. 7091.

(*b*) *Webster v. Christie*, 5 Pat. App. 705.

is open to inspection, and the buyer is presumed to be as good a judge of the article as the seller, and the rule both of law and common sense is *caveat emptor*. Were it otherwise, no man entering into a transaction would be safe without pointing out features which in his opinion were no defects at all, in case other people might think them defects. The safe rule, therefore, is to let the buyer understand that he must trust to his own eye, and if he chooses to buy a thing without examination he has himself to blame. If there be a defect known to the manufacturer which cannot be seen on inspection, he is bound to point it out, and still less is he entitled to artificially hide it so that on inspection it may not be seen. But in making a bargain, a person is not expected to reveal the motives on which he is acting, and the calculations which he has formed (a). When Government in 1799 resolved on the stoppage of the Scotch distilleries for a short time, and a party who had received early intelligence of the introduction of a bill for that purpose bought a quantity of whisky at the current price without telling the news, it was held that the sale was binding, notwithstanding the almost instant rise of whisky in the market (b). On the same principle, a purchaser is bound to satisfy himself of the burdens affecting the subject sold. In a sale of lands subject to the condition that the buyer should perform all the obligations prestable by the proprietor to the tenants, a purchaser wrote to know how far these had been implemented, and was told in reply by the seller's agent, that all the obligations had been implemented, "as he understood." He was held to have no relief when the contrary turned out to be afterwards the fact, inasmuch as the letter did not import a warranty, and he was bound to make inquiries for himself (c). In such circumstances, the parties deal with each other at arm's length; and either of them is entitled to the

(a) *Gillespie v. Russel*, 18 D. 677. (c) *Murray v. Selkraig*, Jan. 26,

(b) *Morison v. Boswall*, Hume 1815, F. C.
679; *Paterson & Co. v. Allan*,
Hume 681.

benefit of his superior skill, experience, sagacity, and intelligence. "If," says Lord Eldon, "an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it. He acts for himself, and exercises his own sense and knowledge,—a rule especially applicable to those matters which it is the other party's professional business and duty to know." But while it may, in most circumstances, be lawful for a trader to withhold, for his own benefit, his earlier or better intelligence concerning matters likely to affect the price of his commodity, he is not at liberty to tell falsehoods, or to resort to cunningly devised expedients, for the purpose of keeping the other in the dark, or enabling him to deal with him at a disadvantage. The right to hold his tongue does not entitle him to tell a lie. The moment he breaks silence he must speak the truth, and nothing but the truth; and a failure in this particular is what is termed fraudulent misrepresentation. It is quite a distinct ground of action from fraudulent concealment; and as one may be proved and the other disproved when an action is rested on both grounds, the pursuer is required to take a distinct issue as to each (*a*). Mere reticence creates no equity, but very little in the way of misrepresentation will do so; for either it will amount to a warranty, and so form a condition of the contract, or the seller has assumed knowledge which he did not possess; and, to save trouble, when he could only safely have said, "I am pretty sure of it," has confidently replied, "I know it," which would be a fraud (*b*). Lord Blackburn has pointed out the distinction between the methods followed in a court of law and a court of equity in dealing with such a question: "The courts of law," he observes, "had to refer fraud, in which knowledge was an essential ingredient, to a jury. A court of equity had to find it for itself, and

(*a*) See Lord Brougham's obs. in *Walters v. Morgan*, 3 De G. Irvine v. Kirkpatrick, 7 Bell's App. F. & J. 718. 186, 211, censuring the old practice of putting both in the same issue.

consequently the judges in courts of equity were not driven to be so precisely accurate in stating exactly whether they were going upon the ground that there was a contract or warranty that the thing was so, or whether they were going upon the ground that the party, knowing it was not, and representing that it was, had committed a fraud in doing that" (a). When an intending buyer puts a question to the seller as to a fact within his own knowledge, it is his duty to remember that the other party is relying on the information which he may communicate; and if it prove to be erroneous, his conduct will not be excused on the ground that he had an indistinct recollection, or had forgotten all about it. In that case he ought not to have undertaken to give more than a qualified reply, and if he gives a direct answer, affirmative or negative, he must make his statement good. As to the duty of breaking silence, the rules are:—(1) When a certain statement has been made in the *bona fide* belief that it is true, and the author comes to know that he was mistaken, he cannot honestly allow the other party to continue under his mistake without retracting what he has already said; if he does so, it is a fraud. (2) Lord Blackburn also says, although he thought it not so clear, "Where there is a duty or an obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say,—if that was done with the intention of inducing the other party to act on the belief that the reason why he did not speak was because he had nothing to say,—I should be inclined myself to hold that that was fraud also" (b).

Active Concealment.—Between positive misrepresentation on the one hand, and silence or non-disclosure on the other, there is a middle species of fraud, which has been termed

(a) Per Lord Blackburn in 5 App. Ca. 925, 950. The morality *Brownlie v. Campbell*, L. R. 5 App. of reticence in mercantile transactions is discussed by Cic. de Off. iii. Ca. 925, 952.

(b) *Brownlie v. Campbell*, L. R. 12, Houlden's ed. 109.

active or *industrious* concealment. Though a man may be entitled to hold his tongue, it does not follow that he is entitled to *conceal*; that is to say, he is not at liberty to resort to any ruse for throwing the other party off his guard, or for putting the means of information beyond his reach. If, besides preserving silence, he takes any step with this view, he is guilty of active fraud. *Aliud est tacere aliud celare*. If there is a defect in the wall of a house which is about to be sold, the owner is not at liberty to plaster it up; nor is the seller of a ship which he knows to be infected with the dry-rot entitled to remove it from the stocks into deep water, where the defect may not be seen (*a*). So, too, a buyer is entitled to profit by his superior skill or enterprise in gaining early information of the state of a foreign market, or some great public event, such as a victory, or the fiscal measures of the Government; but, on the other hand, should he spread a rumour of such an event, when none such had happened, and thereupon operate on the market, it will be held a fraud on the public, and the contracts induced thereby will be deemed void (*b*). "If," says Lord Eldon, "a single word be dropped which tends to mislead the vendor, that principle (applicable to non-disclosure) will not be allowed to operate."

It is a general rule of law, that as a contract induced by fraud is not void but voidable in the option of the party deceived, the option must be timeously exercised, otherwise whatever objections may exist to the contract will be held to have been departed from. Therefore, if a party means to avail himself of the plea of fraud, he should exercise his right of repudiation at once (*c*). The only modification of this rule is in those cases where the fraud was of such a character that the party is prevented from discovering the deception. Thus, although in general it is not correct to say that the delivery

(*a*) *Pickering v. Dowson*, 4 Taunt. 785.

(*c*) *Richmond v. Railton*, 16 D 403; *Cunningham v. Hamilton*, M.

(*b*) *Burnes v. Pennell*, 6 Bell's App. 541.

of goods to a bankrupt, bought by him as a solvent person, will entitle the seller to redress, it would be otherwise were the buyer to promise to pay in a few days, and concealed the fact that he was then taking steps for his sequestration, which was shortly afterwards awarded (*a*). Again, where the fraud is continuous, or the contract has been followed by divers frauds in the prosecution of it, the action is not barred by a plea of acquiescence; for a party seeking the benefit of his fraud comes into court with unclean hands, and unless there is some overt act so clear as to prove that the pursuers continued the dealing after they knew of the facts, and homologated the transaction with their eyes open, the whole matter may be gone into (*b*). So, a second purchaser cannot claim the benefit of his contract if he was aware of the fact that the seller had already disposed of the subject-matter of it to another, and he may be liable in damages to the first (*c*).

(*a*) *Watt v. Findlay*, 8 D. 529.

(*c*) *Marshall v. Hynd*, 6 S. 384;

(*b*) *Gibb & Macdonald v. Wathen*,
5 Mur. 60.

Lang v. Dixon, June 29, 1813, F. C.;
Petrie v. Forsyth, 2 R. 214.

CHAPTER IX.

INJURIES TO LAND.

The Negligent Use of Real Property.

Non-Natural Uses.—The maxim, *sic utere tuo ut alienum non lædas*, which governs the relation between neighbouring estates, has come to be recognised as law, not by force of its morality, but because it concisely expresses the necessary limitations of property in land. A man is free to use for his profit or pleasure the ground which belongs to him, not absolutely, but only in so far as the use which he may make of it is compatible with the enjoyment of a like freedom by the adjacent proprietors,—a principle which (as already explained) has been expanded into this further proposition, that while as regards operations natural and legitimate an owner is not liable except on proof of negligence, there are others which are only lawful on condition that they shall be at his own risk (*a*).

Every landed proprietor must submit to such burdens and inconveniences as arise from the geographical situation of the subject. The example which Erskine (*b*) gives of this occurs in the draining of marshy grounds where the upper heritor is entitled to let the water fall on the inferior tenement; and in the numerous cases which have occurred relating to mining rights, it has frequently been held that if, in consequence of the working of minerals on the rise, the water comes by natural gravitation into the mines of the owner on the dip, the latter cannot maintain any action for the loss thereby sustained. This, however, is only so when no attempt

(*a*) *Sup.*, chap. i. p. 20.

(*b*) *Inst.* iii. 1. 13.

is made to change artificially the relative position of the two properties. If the owner's operations go the length of raising the level so as to increase the flow of water on the adjoining land, an action is maintainable (*a*).

In *Wilson v. Waddell* (*b*), a seam of coal cropped out on the surface on the defender's land; and the coal being removed the ground fell in, with the result that an impervious bed of clay—which so long as it was undisturbed had resisted the surface water—became filled with cracks and fissures through which the water flowed, first into the defender's workings, and then into the pursuer's. The contention was, that as the defender had interfered with the natural condition of the surface of the land, which by its natural drainage had carried off the water which now came into the pursuer's mines, he was entitled to damages. But the House of Lords held, affirming the judgment of the Court of Session, that an upper coal-owner was under no obligation to a lower proprietor to work his coal in any particular way so as to prevent the natural percolation of the water which was one of the incidents of mining. "The general rule of law in both countries," it was observed, "is, that the owner of one piece of land has a right to use it in the *natural* course of user, unless in so doing he interferes with some right created either by law or contract" (*c*).

"Natural user" has been explained to mean any purpose for which, in the ordinary course of the enjoyment of land, it might be used (*d*). The adjacent owner is bound to endure every disadvantage which may come to him from his neighbour's so enjoying his property. But (as already explained) if the owner chooses to create a hazard which did not exist before,—by the erection of an *opus manufactum*, or applying his property to a purpose out of the ordinary course,

(*a*) *Hurdman v. N.-E. Ry. Co.*, L. R. 3 C. P. D. 168. (*d*) Per Ld. Cairns (Lord Chan.) in *Rylands v. Fletcher*, L. R. 3 H. L.

(*b*) L. R. 2 App. Ca. 95. 330, 338.

(*c*) Per Ld. Blackburn in *Watson v. Waddell*, *sup.* 99.

—the risk is his own, and the owner injured in consequence may call on him to make good the damage. When a man for his own purposes builds such a work as a dam across a river, he is bound to make it strong enough to resist floods; and if it gives way, and injures a property lower down the stream, the owner of the dam is liable in damages, even if the flood was an extraordinary one (*a*). And for the same reason, when one brings on his own land something which, although harmless while it remains there, will probably do mischief if it escape, the law casts on him the obligation of making good the damage which may be thereby done to others. “We think that the true rule of law is, that the person who, for his own purposes, brings on his land, and collects, and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff’s default, or perhaps that the escape was the consequence of *vis major* or the act of God. The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour’s reservoir, or whose cellar is invaded by the filth of his neighbour’s privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour’s alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour’s, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or

(*a*) *Kerr v. Earl of Orkney*, 20 D. 298.

answer for the natural and anticipated consequences. And upon authority this, we think, is established to be the law whether the things so brought be beasts or water, or filth or stench^(a). The rule here laid down has been followed and adopted by our own Court ^(b), and it equally applies whether the thing injuriously affected was something to which the neighbouring owner had an express title, or belonged to him as an incident of his property. There is no property in air nor in percolating water until it is caught and impounded; but no one is entitled to poison the air which all have a right to breathe, or to contaminate the water which any one has a right to gather in his well. He may pollute his own well if he thinks fit, but he must be careful not to let the pollution escape into the water-bearing strata, and so make the common source of supply useless to both ^(c).

What are sometimes called the natural servitudes, such as the servitude of support, are simply the necessary limitations of property indispensable to its continued existence. The object is to prevent the mutual destruction of both subjects, and preserve them entire, by giving to each owner the fullest right of use compatible with the existence of the other. Negligence, as applied to land, thus expresses three distinct ideas:—(1) It implies any misuse of the subject in excess of the right of ownership; (2) carelessness in its management to the detriment of contiguous property; and (3) its malicious use by operations *in emulationem*.

Mineral and Surface Owners.—A mineral owner whose property is separated from the surface is not entitled to work the minerals so as to let down the surface, or do any injury to the buildings above ground. Very often mineral operations which have this effect are due to negligence; and in a case

(a) Per Ld. Blackburn in Exch. Ch. in *Fletcher v. Rylands*, L. R. 1 Ex. 265, 279, affd. L. R. 3 H. L. 330. (c) *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. C. 349; *Ballard v. Thomson*, (b) *Chalmers v. Dixon*, 3 R. 461. L. R. 29 Ch. Div. 115.

which occurred in 1867 an opinion was indicated (*a*), that unless the mineral lessee was convicted of working the minerals illegally, which it was thought long-wall according to the custom of the country was not, he was not responsible for the subsidence, even when it caused a house on the surface, erected after the date of the lease, to become ruinous and uninhabitable. But it is now settled, that in order to entitle the surface owner to recover the damage he has sustained from operations beneath, it is not necessary for him to do more than show that the injury might have been avoided by taking proper precautions, or by leaving a portion of the minerals sufficient to form a strong enough roof to bear the superincumbent weight, and if the minerals cannot be wrought out without causing subsidence, it is the duty of the mine-owner to leave them alone. "In other words, when the ownership of the soil generally and of the minerals is severed, the mineral owner has no rights as against the surface in getting his minerals except what the instrument of severance gives him; and if it gives the right to get the minerals without more, there is no right to let down the surface" (*b*).

Damages are equally due when the subject injured is house property. A mineral owner must deal with the surface as he finds it. He is not entitled to restrain the surface owner from increasing the weight to be supported by feuing out the ground for the erection of houses, or using it to the best advantage. This was decided in a case which occurred in the year 1809 (*c*), where the owner of an estate first sold the coal on condition that the purchaser should pay the surface damage caused by the excavation, and subsequently sold the surface to a third party. An attempt was made to interdict the latter from building upon it; but the Court observed that when an estate comes to be divided laterally between the mineral owner and the surface owner, the law applicable was

(*a*) Per Lord Curriehill in *Hamilton v. Turner*, 5 M. 1086, 1096.

(*c*) *Dunlop's Trs. v. Corbet*, June 20, 1809, F. C.

(*b*) Per Lord Bramwell in *Love v. Bell*, L. R. 9 App. Ca. 286, 300.

this: On the one hand, the proprietor of the coal was entitled to do everything which was necessary for the working of the coal, and if the surface were covered with a town, to put down in the middle of it engines or other requisite erections; but, on the other hand, the proprietor of the solum was entitled to convert it to any purpose of pleasure or profit, according to his own discretion, and without control. A feuar may, indeed, be debarred, by the express terms of his contract with the superior, from claiming damages in consequence of the subjacent strata being removed as it was intended to be. He may have built his house on conditions which compel him to submit, or his author may have previously parted with the right to support, in which case he, as a singular successor, will be in no better position (a). But in the absence of any binding agreement to the contrary, there is a natural and legal right to the undisturbed enjoyment of the surface; and although the minerals may be taken out by the person to whom they belong to the utmost possible extent, the damage which may be the consequence will have to be made good, even when the supervening accident, as sometimes occurs, results from the tapping of an old waste through pumping operations carried on in another part of the same field (b). The original support supplied by the hydrostatic pressure to the accumulated water is in that case held to have taken the place of the natural support, and as the withdrawal of the water was a danger to be provided against when the lease was entered into for the working of the minerals, the landlord and the mineral lessee were both responsible to the feuars. But no cause of action arises until signs of subsidence become apparent. When an injury does occur, the short question always is, whether it might have been avoided. It has been held in the House of Lords that every subsequent damage constitutes a new cause of action, although the successive injuries are all referable to the one operation (c). This was held

(a) *Buchanan v. Andrew*, L. R. 2 Sc. App. 286.

(c) *Darley Main Coal Co. v. Mitchell*, 11 App. Ca. 127.

(b) *Baldv. Alloa Coal Co.*, 16 D. 870.

in a case where a subsidence took place in 1868, and caused a certain amount of damage, and a further subsidence in 1882, the effect of workings by an adjoining proprietor. Although the damage had already been recovered for the first injury, a second action brought for the additional injury which subsequently accrued, was adjudged to be competent.

In this case the surface owner who has sustained prejudice from workings below has a double remedy. He may either proceed against the superior *ex contractu* upon the obligations expressed or implied in his feu-charter, or against the mineral tenant *ex delicto* (a).

Building Operations.—It is perhaps due to the judicious action of our Dean of Guild Courts that so few cases have arisen out of building operations in towns. The natural tendency of these courts is conservative; and their practice is to refuse their sanction to operations which involve risk to the adjoining tenements, except of consent. The principle deducible from recent cases is, that the man who causes disturbance in a line of buildings—by taking down and rebuilding his premises—is answerable in damages. He does not warrant his neighbours against injury; but it has been recently said in the House of Lords that the law is “verging to that point, if it has not quite reached it.” Although the claim is still rested on negligence, the least want of care is sufficient, and if not technically a warranty, it is practically the same thing. “This,” says Lord Young, “may be taken to be a safe principle of law, that when a party executes operations on a property (probably the observation may be made generally, but I limit it now to the case of property in towns, where more frequent examples of it are to be found), however lawful and reasonable these operations may be, he must take care, in conducting them, to do as little damage as possible to his neighbour. I should have been disposed to think (but it is unnecessary to decide it) that he must make good by reparation any special damage caused to another by his opera-

(a) *Hamilton v. Turner, sup.*; *Bain v. D. Hamilton*, 6 M. 1.

tions" (a). And in the House of Lords the obligation was placed as high by Lord Fitzgerald: "He is not in the actual position of being responsible for injury, no matter how occasioned; but he must be vigilant and careful, for he is liable for injuries to his neighbour caused by any want of prudence or precaution, even though it may be *culpa levissima*" (b).

The objection to this, as a rule of conduct, consists in the fact that the owner on one side of the line—by contenting himself with shallow foundations and thin walls—may increase greatly the burden thrown on the owner next to him. To this, however, the proper answer was given by Lord Fullerton in a case which depended before him in the Outer House in 1834 (c). "When two different parties," he said, "acquire areas notoriously and confessedly intended for the purpose of contiguous building, and where the one erects a house in a way not absolutely inconsistent with general usage, and not necessarily restrictive of similar operations on the part of his neighbour, such neighbour, if not giving notice, or making objections at the time, must be held to have acquiesced in that mode of using the contiguous property, and in the restraints thence obviously and necessarily arising on the future use of his own; that is, in those restraints indispensable for the security of the adjoining house. If one proprietor is allowed to build a house having no sunk storey, and with a foundation suited to such a plan, without any notice from the adjoining proprietor of a different design on his part, or any requisition that the foundation shall be more deeply laid, the Lord Ordinary does not think that such adjoining proprietor could be entitled, as a matter of right, to adopt a different plan, and to dig out one or two sunk storeys, having necessarily the effect of damaging and probably the effect of destroying the neighbouring house." Where damage was done to a house in

(a) Per Lord Young in *Cameron v. Fraser*, 9 R. 26, 29.

(c) *Murray v. Johnston*, 13 S. 119.

(b) *Hughes v. Percival*, L. R. 8 App. Ca. 443, 455.

Edinburgh by making a sunk storey to the adjoining house, evidence was given to the effect that the operations might have been conducted without doing any injury. And Lord Gillies made the common-sense remark to the jury, that as damage was done, there was little doubt that the operations were improper (*a*). In another case damages were claimed for cracking a mutual gable (which had stood for fifty or sixty years), by converting the lower flat into shops. The case was tried on two issues—one, a general issue whether the operations “caused the injury;” and the other, of unskilfulness. The contention was that everything done within burgh which brings down a neighbour’s house is wrong; and the Lord Chief Commissioner directed the jury that the defender was bound to indemnify the pursuer for the harm which he had caused to his building (*b*). The same applies where the injury is done by blasting operations. If they cannot be conducted without doing harm to persons or property in the neighbourhood, they are illegal (*c*).

The occupant of premises next door is also entitled to be indemnified for the loss and inconvenience which he may suffer in his business, not from the interruption of the street traffic, but from the lime and dust, whenever it appears that the damage so occasioned was preventible. Dwellers in towns must be prepared to submit to some inconvenience from the building operations which are constantly going on. But it is the duty of the contractor to cause the least possible disturbance; and whenever it is so excessive as to lead to the inference that proper precautions were not taken, the contractor will be liable in damages. Necessarily, however, this requires a stricter degree of proof than a case of structural injury. It is obviously unjust to allow a man to break his neighbour’s walls without repairing the injury; but a claim

(*a*) *Callendar v. Eddington*, 4 Mur. 108, 111. are more fully explained by Lord Colonsay).

(*b*) *Douglas v. Menteith*, 4 Mur. 130; *M’Intosh v. Scott & Co.*, 21 D. 363, 368 (where the above cases
(*c*) *Paterson v. Lindsay*, 13 R. 261.

for the indirect results of the mode in which the work was executed requires clear proof of *culpa* to support it (*a*).

When the work to be executed is one from which no hazard was to be anticipated, and the contractor is the only person to blame, the employer is not liable; for he is entitled to assume that it will be done carefully, and having contracted with a prudent and proper person to do it, his obligation is at an end. The relation of master and servant does not subsist between them, and it is no part of his duty to interpose from time to time to see that the contractor, on his part, is duly carrying out his contract (*b*). If, however, the work to be executed may endanger the adjacent building, the employer does not get rid of the responsibility, for no one is entitled to direct an act to be done which he knows to be dangerous, and stand by while it is in progress, except upon the condition that he himself shall bear the risk (*c*). Evidently he is in a different position from one who orders work from which no injurious consequences will arise, except from the workman's negligence, which the employer has no reason to anticipate. Whenever, therefore, it appears that the avoidance of danger will depend on the measures proposed to be taken being adequate to prevent it, the employer remains liable as well as the contractor.

A builder employed to pull down a house, excavate the foundation, and build a new tenement, undertook the risk of supporting the adjoining house as far as might be necessary during the progress of the work, and satisfying the claims thence arising. It was held that the means taken by the contractor, being insufficient for this purpose, the owner was liable in damages for the resulting injury (*d*). And in another case, in which the injury was caused by the builder cutting needlessly into a mean gable for the purpose of fixing a staircase, with the result that one house fell and dragged over the

(*a*) *Laurent v. Ld. Adv.*, 7 M. 607; *Cameron v. Fraser*, 9 R. 26. (*c*) *Bower v. Peate*, L. R. 1 Q. B. D. 321; approved in *Dalton v.*

(*b*) *Daniel v. Met. Ry.*, L. R. 5 H. L. 45. *Angus*, L. R. 6 App. Ca. 829.

(*d*) *Bower v. Peate*, *sup.*

other with it, the House of Lords held, that although the plan followed by the contractor was ill-judged and injurious, the operation involved considerable peril to the neighbouring tenement, and the defender was liable (a).

Duty of Fencing.—In an early case, a man riding on a dark tempestuous night along a road, which although private was generally used by people in the district, met his death by falling into a disused coal-pit, situated four feet from an open part of the road. It had been surrounded by a wall, which from neglect had fallen down till it was only eighteen inches high. In an action by the children of the deceased, the Court assailed a former proprietor of the ground, but found the proprietor at the date of the accident liable (b). Forty years later a similar accident had the same result. A young woman, when being led home in a state of intoxication, broke away from her companions, went off her proper road, and going along a private road fell into a pit insufficiently fenced and was killed. There was here evidence of contributory negligence; but assuming it not to be proved, as the jury found, the father was properly found entitled to damages (c). These cases illustrate the rule that no landed proprietor is entitled to keep his property so as to be a source of danger to the public; and if there be a pit or excavation by the side of the highway, or on ground to which the public have access, it is his duty to fence it so as to prevent the risk of accident. As regards trespassers and licensees he is under no obligation. If a man allows a friend to walk by a tall cliff, the danger is obvious, and he must take it as he finds it. But if he brings a concourse of people to live on his land, or suffers somebody else to do so, a danger which previously was unimportant may become grave, so as to require a fence to be provided. This was so held as regards a quarry which the proprietor suffered to remain unfenced after some cottages had been erected by his mineral tenant for the accommodation of his workmen, the path to which led

(a) *Hughes v. Percival*, *sup.*

(b) *Black v. Cadell*, M. 13,905.

(c) *Hislop v. Durham*, 4 D. 1168.

within twelve feet of the quarry (*a*). So, when a party is suffered to go on the land to render a service,—as when the owner of goods goes to a railway station or sends his servant to assist in unloading them,—there is a mutual contract that due care shall be taken that the premises shall be reasonably safe as regards him (*b*). Much more is this the case when toll is charged to the public availing themselves of the accommodation provided,—in a public dock or harbour, or in a public market. There is no undertaking that a dock shall be absolutely free from obstruction; but the fact that it is kept open is a standing invitation to vessels to come and use it, and the owners are not entitled to persist in this invitation, when they know, or with due diligence might have known, of the existence of a danger (*c*). The use of a public dock or public market is a public privilege; and the individual who, in the exercise of this privilege, suffers damage through the negligence of the custodiers, is entitled to be indemnified whether they derive profit from the tolls for behoof of the corporation, or the revenue is wholly devoted to the maintenance and improvement of the works (*d*).

This doctrine of invitation has now been extended so as to impose on a proprietor of premises the duty of seeing to the safety of all persons who may be expected to come there. A customer who enters a shop, acts on the belief that it is safe to do so; and recently a man who entered the store connected with a manufactory (the office of which was in another part of the town), to inquire if they sold barrels, which they did not do, and never did, was held entitled to damages for having fallen into the well of a hoist on his way out, the well being neither fenced nor lighted (*e*). The premises thus require to be kept safe for customers as well as for non-customers. In

(*a*) *M'Feat v. Rankin's Trs.*, 6 R. 1043. *tion*, L. R. 5 Ex. D. 28; *Winch v. Conservators of Thames*, L. R. 9 C.

(*b*) *Holmes v. N.-E. Ry. Co.*, L. R. 4 Ex. 254. P. 378.

(*c*) *Mersey Docks Trs. v. Gibbs*, see also *Indermaur v. Dames*, L. R. 2 C. P. 311.

(*d*) *Lax v. Darlington Corpora-*

another case, where the accident arose from a man in a public-house mistaking a door opening into a cellar for that of a lavatory, and falling down the steps, the Court found the proprietor liable in damages, as two previous accidents of a similar kind had revealed the existence of the danger, and he should have had the door locked (*a*).

One, however, is not liable to a guest or visitor in the same degree as to an invited person, because when he sends him his invitation, it is like the offer of a gift of friendship or hospitality; and "the principle of the law as to gifts is that the giver is not responsible for damage from the insecurity of the thing, unless he knew its evil character, and omitted to caution the donee" (*b*). He is only liable, therefore, for something of the nature of a trap, which would be a fraud on the guest (*c*).

Responsibility for an accident arising from the condition of real property, may devolve on the tradesman who did the work, on the tenant, or on the proprietor. In an early case, in which a person in the dark had turned into a passage in an unfinished house, and sustained severe injuries by falling into the cellar, the Court allowed damages against the proprietor; but subsequently they held him entitled to relief from the contractor, who was in fault, not having the passage barred while the building was in course of construction (*d*). But in a later case, where the accident was due to the fault of a sub-contractor for the plaster work in not fencing a heap of material on the street, the Court, while finding this person liable, declined to conjoin with him the principal contractor and the employer. "The question of responsibility," said Lord Fullerton, "must depend on the question whether the operation was in the least degree hazardous. If it were so, the employer might be liable, although he had devolved the actual execution of the operation on a contractor. But here there was nothing

(*a*) *Cairns v. Boyd*, 6 R. 1004.

(*c*) *Southcote v. Stanley*, 1 H. &

(*b*) Per Willes, J., in *Gautret* N. 248.

v. Egerton, L. R. 2 C. P. 371,
375.

(*d*) *Chapman v. Parlane*, 3 S. 585;
Bennie v. Parlane, 4 S. 122.

hazardous ; and if a party employed to perform the very safe operation of plastering a house executed it in a dangerous way, he only is blameable" (a).

This case, therefore, decides that when the work is in the hands of the tradesman, he is the party responsible ; and the proprietor is not liable for the consequences of the tradesman's negligence. But as soon as it is taken off his hands, it reverts to the proprietor's occupation, with all its imperfections ; and if damage to the neighbouring tenement results from the imperfect character of the work, it is not for the proprietor to plead that he employed a competent tradesman to do it. So early as the year 1666, it was held that a liferenter was liable to repair the hurt occasioned to a neighbouring tenement by the fall of a house which had been suffered to become and was obviously ruinous (b) ; and in a question with the public, when the cause of the damage is a structural defect, not in any way attributable to the fault of the tenant, the proprietor is answerable.

In *Cleghorn v. Taylor* (c), a proprietor was held liable for the damage done by a chimney-can falling through the adjoining roof into a china shop in another property. A competent slater had been employed to fix the can, but the work had been done in so insecure and insufficient a manner that it fell in about a month after its erection. The defender had not interfered directly or indirectly with the execution of the work, and had no reason to believe that the can was not perfectly secure. Lord Wood laid it down, that in towns proprietors must answer for their property not being in a perfect state ; and Lord Justice-Clerk Hope said that to fix him with liability it was not necessary to show that he wilfully caused or knowingly allowed his property to be put, or to remain in, a condition insufficient and insecure. But in the later case of *Campbell v. Kennedy* (d) it was explained that this expression of judicial opinion must be taken with

(a) *M'Lean v. Russell, M'Nee*, & Co., 12 D. 887, 892.

(b) *Hay v. Littlejohn*, Stair's Decis. vol. i. p. 413.

(c) 18 D. 664. (d) 3 M. 121.

some reservation, for in Cleghorn's case the Court did not require to decide, and did not mean to decide, more than that when a proprietor employs a tradesman to do something to his property, it is the proprietor and not the tradesman who has to answer to the public in the event of its proving insufficient. The foundation of liability is still negligence; and *culpa*, to some extent, must be proved (*a*). But the *onus* rapidly shifts; for, as has been observed in this and similar cases, the term "onus of proof" is merely a rule for deciding when a *prima facie* case is strong enough to call for an answer: it is not a rule to enable the jury to decide conflicting evidence; it merely states on which party the obligation of going further rests, if he wishes to win (*b*), and the fact of the accident may often of itself be sufficient proof of the negligence of which we speak.

Landlord and Tenant.—A landlord is only liable for his own negligence, not that of his tenant. If the injury is due to the landlord's own neglect in suffering the holding to fall into a state of disrepair, he is liable for the consequences, and on this ground the owner of a tenement of houses approached by a common stair was found liable in damages for the stair becoming unsafe, in consequence of which a child fell through between the bannisters and was killed (*c*). But where the erection which has proved insufficient was built by the tenant himself for his own accommodation, the proprietor is not responsible (*d*); and if the damage is attributable, not to the state of the premises, but to the negligent use which the tenant has made of them, he must answer for his own wrong (*e*).

If an accident occurs to a passer-by on the public street,

(*a*) Per Lord Neaves in *Campbell v. Kennedy*, *sup.* 125, explaining 411.

Cleghorn v. Taylor, *sup.*; *Laurent v. Lord Advocate*, 7 M. 607. (*c*) *McMartin v. Henry*, 10 M. 868.

(*b*) Per Bowen, L.J., in *Abrath v. N.-E. Ry. Co.*, L. R. 11 Q. B. D. 440, 456. (*d*) *Henderson v. Stewart*, 15 S. 868. (*e*) *Hume* 522; *Weston v. Inc. Tailors*, 1 D. 1218.

owing to a hatch or grating having been negligently left open or improperly guarded, the tenant is answerable; and if the person to blame is a carter delivering goods into the cellar below, the responsibility in a question with the public is still the tenant's. It is his duty as occupant of the premises to see that they are so used as to involve no danger to the public; and having entrusted to a stranger the duty of attending to the hatch, this person's neglect is no answer to the claim of damages (*a*).

The duty of fencing a disused pit primarily devolves on the tenant; but as the person injured may not know who the tenant is, or whether he is still in possession, or whether the landlord may not have released him from the obligation, he is entitled to go directly against the landlord, and leave him to operate his relief against the person primarily bound (*b*). If the ownership of the minerals and the surface be severed, the surface owner seems to be under no obligation to fence the mineral owner's pits (*c*).

The mutual obligations which arise between tenants holding under the same landlord, differ in no respect, so far as the penalties of negligence are concerned, from those which subsist between strangers. If a drain is allowed to become choked, with the result that the accumulated water, unable to escape, floods a field situated on the lower level, the tenant in fault is answerable for the damage so occasioned (*d*).

A tenant who has taken premises exposed to an obvious danger, cannot throw the responsibility for a supervening accident on the proprietor. He has taken the premises in the condition in which he finds them; and the danger was obvious; and if he desired anything further to be done for the safety of himself or his family, he should have stipulated for it in the lease, which, after the contract is concluded, is the measure of the landlord's obligation. The landlord is only

(*a*) *Pickard v. Smith*, 10 C. B. N. S. 470.

(*c*) *Williams v. Groucott*, 4 B. & S. 149.

(*b*) *Mack v. Allan*, 10 S. 349.

(*d*) *Lyons v. Anderson*, 13 R. 1020.

liable for a breach of his agreement to repair; and if the accident is due to imperfect execution, he has relief against the tradesman whose workmanship is in fault. In one case, where four years had elapsed between the date of the contract and the date of the damage (due to a leak in an imperfectly closed lead pipe), the Court found the tradesman liable in the amount of the damage, which in the meantime the landlord had been obliged to pay to his tenant (a).

On the other hand, the tenant may render himself liable in damages to the proprietor for a misuse of the property contrary to the terms of the contract; and he is liable for the loss caused to third parties by the fall of a building, caused by his storing in it a greater weight than it was able to bear (b).

Trespass.—Trespass with respect to another man's land is an entry on the same without lawful authority. It is trespass also to allow one's cattle or horses to stray across another's field. In Scotland a man may not impound cattle or horses which he finds trespassing on his farm, but he is entitled to chase them off, with a due regard to their safety and without unnecessary violence (c). A licensee entitled to enter for a limited object, is guilty of trespass in so far as he exceeds the purpose, and commits an abuse of his authority. It has been held that if a man plants on his ground yew trees which are noxious to horses, and so near the land of a neighbour that the branches project over his ground, so that his horses crop the leaves and die therefrom, the owner of the trees is liable (d).

The rule which forbids intrusion on another's property is relaxed in certain circumstances. A trespass is justifiable if committed in order to escape some pressing danger, or in following property, preventing a crime, pursuing a criminal,

(a) *M'Intyre v. Gallacher*, 11 R. 64. *Unthank*, 6 S. 211; *Duncan v. Kid*, M. 10,514.

(b) *Cal. Ry. Co. v. Greenock Sacking Co.*, 2 R. 671.

(c) *L. J.-C. Boyle in Herriot v. Newberry*, L. R. 7 Q. B. 31.

(d) *Crowhurst v. Amersham Burial Board*, L. R. 4 Ex. D. 5; see *Wilson v. Newberry*, L. R. 7 Q. B. 31.

extinguishing a fire, and killing foxes and wild animals, destructive of sheep, if such be the custom of the district (*a*).

In trespass, proof of actual damage is unnecessary; for the fact that the exclusive property of another has been invaded entitles the latter to a verdict. Inasmuch as a disputed right of property may turn on the slightest encroachment,—an overhanging tree (*b*), a jutting cornice (*c*), an eavesdrop not founded on servitude (*d*), a wall overhanging the march (*e*),—such questions are tried frequently in this country in the form of an interdict, where the question is not damages, but the settlement of the question of right between the parties. It is not, however, competent to obtain an interdict to prevent a trespass against a person who is not shown to have an intention to trespass (*f*). The application requires to rest on reasonable grounds of apprehension from acts already done or threatened. To justify the interposition of the Court, the applicant must show a legal title to the subject, of which his use, enjoyment, and possession are alleged to be unlawfully interfered with; further, either that there has been plain invasion of his property by a party having no right or title whatever in or to the subject, or its use, or as against a party pleading competing title, that he has had possession, in virtue of his title, for at least seven years prior to that attempt to innovate on it, of which he complains, when he will be entitled to interdict *uti possidetis* (*g*).

Muir-burning.—The practice formerly known in certain parts of the Highlands of burning the heather, is forbidden by statute except between 1st November and the 11th of April; or in the case of wet and marshy lands, the 25th of April. Between these dates it appears to have statutory sanction as a proper act of agricultural administration, provided due care

(*a*) *Colquhoun v. Buchanan*, M. 4997.

(*b*) *Halkerston v. Wedderburn*, M. 10,495.

(*c*) *Miln v. Mudie*, 6 S. 967.

(*d*) *Hazle v. Turner*, 2 D. 886.

(*e*) *M'Intosh v. Scott & Co.*, 21 D. 363.

(*f*) Per Lord President Inglis in *Rankin v. M'Lachlan*, 3 M. 128, 133.

(*g*) Per Lord Cowan in *Colquhoun v. Paton*, 21 D. 996.

is taken to prevent the fire spreading. A passage in the Roman law exempts the party from responsibility unless it was done on a "windy day;" but in an early case in the beginning of the century the Court rejected this as a conclusive test, and found a proprietor liable for the act of his servants in allowing the fire to spread, although it was maintained that this was due to a sudden gust of wind. The case practically decides that the party acts at his own risk (*a*).

Nuisance.—The law of nuisance now divides itself into two parts. As a branch of public police, it is enforced for the prevention of disease by the local authorities entrusted with the administration of the Public Health Act. A nuisance in the sense of this Act is something injurious to the public health. But a nuisance at common law is anything which interferes in a sensible manner with the physical comfort of human existence, whether it affects the health or not. Many things which would be nuisances if done wantonly and maliciously,—such as burning weeds, emptying cesspools, etc.,—may be lawfully done, because, as has been explained by Lord Bramwell (*b*), they are necessary for the common and ordinary use and occupation of land and houses. They are, moreover, temporary, and presumably will be done in a proper and convenient manner. But when a man exposes his neighbours to noise, smoke, unwholesome smells, or offensive vapours, or discovering a valuable seam of clay in his property starts a brickwork, he exceeds the liberty which the law gives him in the enjoyment of his property, and the work will be interdicted whether permanent or tem-

(*a*) 13 Geo. III. c. 54, Lex aq. 30, § 3, Grueber 126; *Keith v. Keir*, 10 June 1812, F. C. In *Mackintosh v. Mackintosh*, 2 M. 1357, the Court, misled by a report of *Keith's* case, said the servants had acted against express orders; but in *Baird v. Hamilton*, 4 S. 790, the Lord President (Hope) said that the Session papers in the case showed that the servants had been expressly authorized to make use of fire.

(*b*) *Bamford v. Turnley*, 31 L. J. Q. B. 286, appd. in *Fleming v. Hislop*, L. R. 11 App. Ca. 686, 697.

porary, and however carefully the work may be conducted. Nor is the fitness of the locality any justification for carrying on an offensive trade, if the annoyance is in fact sufficiently great to amount to a nuisance (*a*).

It used to be thought that no one had a right to complain of a nuisance which existed before he came to live there; but there is now no doubt that whether one goes to the nuisance or the nuisance comes to him, his right is the same. A man may act as he thinks proper so long as he has no neighbours to disturb, but when the adjacent land comes to be built upon he is not entitled to continue an occupation which, from noise or otherwise, has come to be a source of annoyance to the neighbourhood (*b*). On the other hand, a man who selects, say a mining district, as his place of residence, must be content to put up with the neighbourhood as he finds it. In trying an action in the county of Durham for injury arising from smoke in the town of Shields, Lord Cranworth told the jury that what they had to consider was not whether abstractly the smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields; because if it only added in an infinitesimal degree to the quantity of smoke, he held that the state of the town rendered it altogether impossible to call that an actionable nuisance (*c*).

Prima facie it is the occupier and not the owner who is liable for a nuisance on the premises. A landlord is not liable for his tenant's acts unless the premises have been let with the existing nuisance upon them, or the nuisance of necessity arises from the purpose for which the premises were let. If it is proved that with due care they might have been used for the object contemplated by the lease without creating

(*a*) "The word 'material' is one used continually in endeavouring to explain to a jury what it is which would constitute a nuisance, as distinguished from something which might indeed be perceptible, but not of such a substantial character as to justify the interference of the Court or allow the maintenance of an action in conformity with the legal maxim, 'Lex non favet delicatorem votis.'"—Per Lord Bramwell in *Fleming v. Hislop*, *sup.* 694.

(*b*) *Fleming v. Hislop*, *sup.*

(*c*) *St. Helen's Works v. Tipping*, 11 H. L. 642, 653.

a nuisance, the landlord is not responsible (*a*). This rule applies both as between the landlord and the public, and between different tenants holding under the same landlord. When a nuisance is due to the works of different manufacturers, and it is difficult to trace the amount of pollution, whether the subject be air or water, contributed by each, they are all liable to be proceeded against (*b*).

Pollution of Rivers.—The right to running water is an incident to the ownership of the land. There is no right of property in the water itself, but the owner of the bank is entitled to the use of the stream for man and beast; and so far as regards these primary uses, he is not, in the event of a scarcity, concerned with there being a possible deficiency for the proprietors farther down. He is also equally entitled to make any further or extraordinary use of the water, but only on condition that thereby he shall do no prejudice to the proprietors above or below. He must not interrupt the regular flow of the stream; nor (subject to its natural uses) diminish it in quantity or deteriorate it in quality (*c*). Such being the extent of the right of which running water is capable, it is obvious that no one is entitled to throw impurities into it—especially artificial impurities; and the pollution may be interdicted at the suit of any lower heritor who has sufficient title and interest to complain. This interest is excluded when (1) what has been done by the offending heritor is immaterial; (2) when the river is able in virtue of its own natural action to get rid of the impurity before it reaches the complainer; and (3) when the stream from long acquiescence has become so foul that any additional impurities thrown into it become unimportant (*d*).

The law on this subject has been examined and expounded

(*a*) *Harris v. James*, 45 L. J. Q. B. 545.

(*b*) *D. of Buccleuch v. Cowan*, 5 M. 214.

(*c*) *Miner v. Gilmour*, 12 Moore P. C. 131.

(*d*) The common law is now considerably strengthened by the Pollution of Rivers Act. The subject is fully discussed, and all the cases will be found noted, in Rankin's *Land Ownership*, pp. 465–473.

by the Lord President in the case relating to the pollution of the Esk. The issue was—Whether the defenders discharged refuse or impure water into the North Esk to the nuisance of the pursuers? The question was presented to the jury by the learned judge substantially in this form: a riparian owner is entitled to complain, not of every pollution, but of such pollution as renders the water unfit for primary purposes; his right to complain then emerges, but it will be a good defence against the complaint if the stream from time immemorial has been devoted to secondary purposes such as manufactures, so as to supersede and abrogate the primary purposes. These directions were upheld by the Court, which also decided that the fact that a stream is fouled by others is no defence to a suit to restrain the fouling by one (a).

Acts in emulationem vicini.—The civil law deemed an act lawful in itself to be unlawful if done with the malicious intent of injuring one's neighbour, *animo vicini nocendi*; and the principle has been transferred into the law of Scotland, which allows an act to be challenged if done *in emulationem vicini* (b). In giving judgment in *Chasemore v. Richards*, Lord Wensleydale in 1858 (c) adverted to this doctrine, and spoke in a tone of regret that it had found no place in the law of England. In *Ritchie v. Purdie* (d), Lord Gillies made a remark to the same effect: "I feel the more anxious to preserve this useful principle of our law unimpaired, from having heard a high authority in the law of England on one occasion express strongly his regret that no such principle was recognised in their law, as he conceived that it was productive of most salutary effects in ours." The case in which this was said related to the right of the owner of one of two houses

(a) *D. of Buccleuch v. Cowan*, *sup.* 217, 218; *Ewen v. Turnbull's Trs.*, 19 D. 513; *Crossley v. Lightonby*, 2 Ch. 478.

(b) The passage in the Digest (39. 3. 1-12) is as follows: "Denique Marcellus scribit; cum eo, qui in suo

fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem. Et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit."

(c) 7 Cl. H. L. 349, 388.

(d) 11 S. 771.

reached by a common stair to break out a door in the stair; and the Court, after inspecting the premises, came to the conclusion that the party resisting the operation had no interest to oppose it. The judges used the phrase in a more extended sense than the words naturally bear. A man insisting on matters remaining *in statu quo* is not bound to explain the motives of his opposition; it is enough if he does not choose to submit or consent; and, as was pointed out in a later case by Lord Jeffrey (*a*), the doctrine of *emulatio vicini* applies only to *active* uses on the part of a proprietor of the property which belongs to him.

It is not easy to gather from the decisions what an emulous act is. Professor More defines it as forbidding "any use which, without producing any substantial benefit to himself, shall materially injure his neighbour" (*b*); but the illustrations which he gives of the application of the doctrine are nearly all referable to either encroachment or nuisance (*c*), and did not require to be rested on the nimious character of the act, or the motives by which it had been influenced. Probably it means no more than that every one is bound to exercise his rights as a proprietor in a *reasonable* manner; and when the operation challenged appears to proceed from pure malevolence, and with no view to his own benefit, the Court, as a court of equity, may interfere for the other's protection. "Rights and privileges," says Lord Kames (*d*), "are bestowed on us for our own good—not for hurting others;" and, adopting the example given in the passage already cited from the Digest, he says, "A man may lawfully dig a pit in his own field, in order to intercept a vein of water that runs below the surface into his neigh-

(*a*) *Graham v. Greig*, 1 D. 171, 177.

(*b*) More's Lects. vol. i. p. 608.

(*c*) *Ross v. Baird*, 7 S. 361, an erection ordered to be removed to less offensive situation; *Ralston v. Pettigrew*, M. 12,808, limekiln; *Dewar v. Fraser*, M. 12,803, but where no site equally convenient

could be found, held that it must be submitted to; *Brodie v. Cadel*, 4 Br. S. 660, anchoring, and unloading ballast on salmon stells; *Irving v. Leadhills Mining Co.*, 18 D. 833, mining rights; *Gray v. Maxwell*, M. 12,800, servitude of aqueduct.

(*d*) Kames, Pr. Eq., book i. part 1, ch. 1, § 1, "protecting from harm."

bour's property, *provided* his purpose be to have water for his own use; but if his purpose be to hurt his neighbour without any view to benefit himself, the act is unlawful, as proceeding from a malevolent intention; and a court of equity will restrain him from this operation. Upon the same principle is founded the noted practice in a court of equity, of refusing to sustain an action at law unless the plaintiff can show an *interest*; for if he can take no benefit by the action, the presumption must be, that it is calculated to distress the defendant, and done *in emulationem vicini*." In effect, therefore, it entitles a proprietor to complain of an act of his neighbour, which, although not challengeable on the ground of nuisance, or as an invasion of his proprietary rights, may nevertheless be held to be an unreasonable exercise of his ownership; and in further proof of this, evidence may be given to show that his object is in no proper sense his own advantage, but to deprive the complainer of a benefit he already has, or otherwise to subject him in some indirect way to distress and annoyance.

Injuries by Animals.—A person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril (*a*). If it is of a notoriously fierce and mischievous species (*b*), or if he has had notice that it is accustomed to bite mankind, or indeed to manifest a dangerous disposition (*c*), he has no right to keep it at all; and, without proof of negligence, is liable for all the damage which it may occasion. So early as the year 1678 we find a reference made to the "pushing ox" of Exodus, in an action brought for the damage done by defender's dog in worrying sheep and lambs, "after he had intimated to him his scaith;" and this seems to be the foundation of the rule of law (*d*).

(*a*) *Burton v. Moorhead*, 8 R. 892.

(*b*) Like a monkey, *May v. Burdett*, 9 Q. B. 101.

(*c*) *Renwick v. Von Rotberg*, 2 R. 855; *Hennigan v. M'Vey*, 9 R. 411; *Fraser v. Bell*, 14 R. 811.

(*d*) *Todridge v. Androw*, 3 Br.

Sup. 223; Stair 1. 9. 5. Exod. xxi. 28, "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox

In suing for injuries caused by ferocious animals, the pursuer must set forth the mischievous propensity of the animal, the keeping of it by the defender with knowledge of such propensity, and the injury which he suffered. The custodier is liable to the injured man (although not the owner) if he had knowledge (*a*), which may be inferred from the known character and habits of an animal of the same breed, or from its having already exhibited symptoms of an intractable disposition. When these facts concur, an express averment or proof of negligence in the keeping of the animal is not absolutely necessary. It is enough if the proprietor knew, or ought to have known, that he was unsafe. When he does so, it is his duty to get rid of him as fast as possible.

The leading authority on this subject is *Fleeming v. Orr* (*b*), in which the owner of a young fox-hound, allowed to go about loose, was charged with the price of certain sheep which had been worried on a neighbouring farm. The Court held the owner liable, on the ground that it was proved that the sheep were destroyed by a fox-hound, and that the fox-hound was in defender's keeping. But, on appeal to the House of Lords (*c*), the judgment was reversed, as blame could only attach to the owner after ascertaining that the animal has propensities not generally belonging to his race.

This decision led to the statute 26 & 27 Vict. c. 100, under which, in sheep-worrying cases, the pursuer is not required to prove a previous propensity in the dog to injure sheep and cattle. When it is proved that a dog has injured any sheep or cattle (which includes horses), the occupier of any house, or place, or premises in which the dog has been usually kept, or permitted to live or remain, at the time of the injury, is liable as the owner, unless he can prove that

shall be quit. But if the ox *were* woman; the ox shall be stoned, and
went to push with his horn in time his owner also shall be put to death.”
 past, and it hath been testified to his (a) *Cowan v. Dalziels*, 5 R. 241.
 owner, and he hath not kept him in, (b) 15 D. 486.
 but that he hath killed a man or a (c) 2 Macq. 14.

he was not the owner at the time when the injury complained of was committed, and the dog was kept or permitted to live or remain on the premises without his sanction or knowledge (*a*).

It is obvious that the duty of the owner of a bull, or an infuriated cow, may be very different in regard to the public going along a public thoroughfare, and his domestic and farm servants about the premises where the animal is kept. In regard to the former, he is bound to exercise special caution (*b*); as to the latter, he is allowed a reasonable discretion, and is not bound to confine it, unless it has shown propensities more than usually vicious. The danger is as well known to the servants as to the master; they are as much bound to take care of themselves as the master; and it will require a case of extreme recklessness on the part of the latter to establish responsibility for an injury done to one of the farm-servants by any of the cattle (*c*). But the general public require a much larger protection. If a bull is permitted to stray on a public highway, or to graze on a field through which there is a right of way, the owner cannot reasonably expect that the public should run the risk of an accident. It is his duty to see that his bull is not permitted to come near strangers unaccompanied by those checks which prudence may suggest as necessary to the public safety; and in the event of any failure in this particular, he will have to answer for the consequences (*d*).

Damages are due for wrongfully sending diseased cattle to a farm, the defender knowing, or having cause to believe, that when they were so sent they were infected with a contagious disorder (*e*), or if by ordinary care and intelligence he might have known it (*f*). If the act is done by a servant in the course of his duty, it is not necessary to prove that the

(*a*) *M'Intyre v. Carmichael*, 8 M. 570.

(*d*) *Hudson v. Roberts*, 6 Ex. 697.

(*b*) *Phillips v. Nicoll*, 11 R. 592;
Harpers v. Gt. North of Scotland Ry. Co., 13 R. 1139.

(*e*) *Scott v. M'William*, 17 D. 1074.

(*c*) *Clark v. Armstrong*, 24 D. 1315.

(*f*) *Robertson v. Connolly*, 14 D. 315.

master as well as the servant knew of the disease; it is enough if the servant knew, even although the master was innocent (*a*).

Damage by Game.—The law of England gives the owner of the soil a qualified right of property in the wild animals which may be found upon it. In Scotland they belong to nobody until captured, and then they become the property of the captor. To say that “the game belongs to the landlord” is true only in this sense, that he alone has the right of shooting or capturing game; the occupier cannot prevent him, even when there is no reservation of the game in the lease (*b*); nor is the tenant entitled to scare the game off the lands, by pursuing them with muzzled dogs, and firing blank cartridges, and setting snares which may entrap and injure them (*c*). By the common law, all that a farmer may do for the protection of his crops is by destroying rabbits,—which are not game,—and then only with the landlord’s consent, if they have been reserved in the lease (*d*)—a consent which he cannot give after parting with his right to the rabbits to a game-tenant (*e*).

The game on a farm is fed by the tenant; and it may be assumed that when he acquired his lease, he had in view the fact that he would always be bound to maintain a certain *normal* stock—for there is almost no land wholly without vermin and wild animals of some sort. If he had been a free agent, he would naturally have taken the steps necessary for keeping them down; and if he failed, and suffered in consequence, *sibi imputet*. But the growth of the love of “sport” during the last thirty years, and the money which came to be made by landlords selling the privilege of shooting over their estates, led gradually to increasing stringency in the

(*a*) *Baird v. Graham*, 14 D. 615. (*d*) *Moncrieff v. Arnott*, 6 S.

(*b*) *Ronaldson v. Ballantine*, M. 530.

15270.

(*e*) *North & George v. Cumming*,

(*c*) *Wemyss v. Gulland*, 10 D. 3 M. 173.

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game clauses of leases, and gave rise to many complaints of "over-preserving." In these cases the common law on the subject was very clearly explained. The landlord is entitled to have his game supported, but only to a reasonable extent. He has warranted to the tenant the beneficial possession of the land for the purposes of agriculture; and to give him the unlimited power of turning it at his pleasure into a game preserve, would be to permit him to act in contradiction to his contract. Accordingly, while the tenant, having regard to the state of matters at the creation of the lease, is not entitled to complain of a reasonable extent of game, he has a good claim for damages *quoad* the excess. "The true ground of damages," says Lord Fullerton, "seems to be, not that the game is abundant, but that its abundance has been materially increased since the date of the lease, in consequence either of the active measures of the landlord, or his failure to keep down the burden; which last circumstance must be held as equivalent to his act, as the right so to keep it down is one expressly withheld from the tenant" (a). "I think," says Lord President Inglis, "the great principle involved in that rule is that something has been done by the landlord not contemplated in the contract of lease, and against the faith of the contract. The parties making no particular stipulation about game, must be held to have looked at the land as it then stood, seeing it largely or reasonably stocked with game, as the case might be, and proceeding on the reasonable supposition that there was to be no material alteration on the lands during the currency of the lease" (b). Clauses were next inserted in leases, which obliged the tenants to submit to whatever injury might be caused by game without compensation. These clauses were held to be sufficient to protect the landlord, where there had been a considerable increase—if that had not arisen from fault or design on his part (c). But he was bound to act

(a) *Wemyss v. Wilson*, 10 D. 194, (b) *Morton v. Graham*, 6 M. 71.
 202; *Drysdale v. Jamieson*, 11 S. (c) *Cadzow v. Lockhart*, 3 R.
 147; *Cock v. Neville*, H. 602; 666.
Grahame v. Mackenzie, H. 641.

reasonably, and in accordance with the good faith of the contract; and it is always open to the tenant to prove that there has been such gross failure on the landlord's part to keep down the game, as to entitle him to damages.

By the Ground Game Act of 1880 (*a*), every occupier of land is vested with the right to kill and take hares and rabbits concurrently with any other person who may be entitled to the game on the same land. Before this Act, it had been held that when the landlord authorized a tenant to kill the rabbits on the farm, his duty in the premises was at an end. And unless the rabbits came from ground on which the pursuer had no power to enter, he could not thereafter claim damages from the landlord for injury done to his crops by rabbits (*b*). It follows, as the tenant under the Ground Game Act has now the hares and rabbits in his own hands, no further claim for damage can be made against the proprietor—unless on the ground that the breeding of them was excessive in the plantations and covers in the immediate neighbourhood of the farm. If the agricultural tenant is found entitled to damages from the landlord,—in respect of the game being overstocked,—the latter has relief against the game-tenant, on the ground that his suffering the cause of complaint to arise was in effect a violation of the contract under which the right of shooting was assigned to him (*c*).

A tenant claiming damages for injury done by game is not entitled to go back on the whole period or any part of his incumbency, if he has paid his rent in former years without complaint. He is limited to the last year of his lease, if he remains silent during its continuance (*d*).

(*a*) 43 & 44 Vict. c. 47.

(*b*) *Wood v. Paton*, 1 R. 868.

(*c*) *Kidd v. Byrne*, 3 R. 255.

(*d*) *Broadwood v. Hunter*, 17 D. 340.

CHAPTER X.

DEFAMATION.

Verbal Injury.—Although in strictness slander is the generic name for any kind of defamation, spoken or written, it has been found convenient to confine its application to what is spoken; while libel is employed to signify any attack on the reputation which is written or printed (*a*). At one time the law of England agreed with the law of Scotland in making no distinction between them; but the old common law of that country, in its favour for freedom of speech, refused all redress for language, written or spoken, which did not charge a crime or affect a man in his office or business (*b*).

(*a*) Borth. on Libel, 31.

(*b*) "For the plaintiff in error it has been truly urged that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognised by the Courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or

officer,—for all these an action lies. But for mere general abuse spoken, no action lies." C. J. Mansfield in *Thorley v. Lord Kerry*, 4 Taunt. 354, 364. He proceeded to deal with the reasons commonly given for the distinction,—the tendency to provoke a breach of the peace, which he thought was no ground for recovering damages, and was irrelevant; the deeper malignity shown by writing,—but he said the action is maintainable for the damage sustained, and not the malignity; the wider diffusion of words through the press,—but an assertion made on the Royal Exchange concerning a London merchant may be much more injurious than a few printed papers or a private letter. He therefore repudiated the distinction

In Scotland, actionable language is not subject to any such limitation; but, on the other hand, between oral and written slander no distinction has ever been recognised; the mode of publication, whether by speech or writing, printing or signs, being considered immaterial (*a*). In the opinion of Mr. Ferguson (who was at one time one of the judges of the Consistorial Court), the most accurate and comprehensive definition of defamation as understood in Scotland is that which is given in one of the text-books of the Civil Law, "*quodvis dictum factumve ad alterius contumeliam dolo malo directum*" (*b*). An affront or insult, by word or gesture, calculated to wound, and grave enough to imply malice, is actionable. "Any imputation on a man's good name," says Lord Kames, "may be sued before the Commissaries, even where the scandal is of such a nature that it cannot be the occasion of any pecuniary loss; it is sufficient to say, I am *hurt* in my character;" and this corresponds with the modern definition of slander, namely, "anything which tends to disparage a man in the eyes of his friends or the public" (*c*).

In the passage cited from the Civil Law, the essential element is *dolus malus*, and the reason is that the right of speech being one of the natural rights of every citizen, an action of defamation always implies that the defender has been guilty of an abuse of that right. Hence in English pleading the allegation is that the words were spoken "falsely and maliciously" (*d*); but the proof of the malice

between written and spoken scandal; but that distinction had been established by some of the greatest names known to the law—Lord Hardwicke, Hale, Holt, C. J., and others, and the Court could not, in opposition to them, at that time of day lay down the contrary.

(*a*) *M'Kay v. M'Cankie*, 10 R. 537.

(*b*) Consist. Law, 228; Heineca, 4. 4.

Contumelia. — Affront, opprobrium, stigma. See D. 37. 14. 1; D.

47. 10. 33; D. 48. 5. 38. 1; contumeliosum sibi libertum queri, D. 1. 12. 1. 10; injuria contumeliosior, D. 47. 10. 7. 7; contumeliose, D. 7. 1. 27. 1.

(*c*) Law Tracts, 2nd ed. (1761), p. 225. Stair's Inst. i. 9, § 4. This also constitutes an actionable libel in England, *Watt v. Cameron*, 4 July 1888.

(*d*) Libels are divided into seditions, blasphemous, obscene, and defamatory, and the publication of them is by the law of England an

is contained in the document itself, for whenever one, having no call or occasion to speak of another, casts a slur on his reputation, he must have intended to do him an injury, and malice is inferred. In Scotland, the phrase in the common issue is "falsely and calumniously," but the result reached is the same; for what is calumnious is presumed to be false (unless the defender proves it to be true), and what is both false and calumnious is presumed to have been spoken wantonly (*a*), unless the occasion entitled the defender to speak, when the pursuer must show by extrinsic evidence the existence of malice.

Libel or no Libel for the Jury.—The question of the relative functions of the judge and jury in libel cases has been long conclusively settled. It is for the Court, in granting an issue, to say whether the words are libellous, and if the writing is capable of the meaning assigned to it; and it is for the jury to decide whether the writing actually has the meaning ascribed to it. Publication, meaning, motive, bonafides, malice, truth, or falsehood, all of which may enter into the determination of a libel action, are all questions of fact, of which the jury have the entire control. But at one time in England the judges (at least in political cases) held that libel or no libel was a question of law for the Court, and directed the jury to convict if they considered the publication proved. Naturally juries, when political feeling was running high, resisted this usurpation of their office by finding verdicts of "guilty of publishing only," or "not maliciously;" and when these verdicts were refused to be taken, they gave the general verdict of "not guilty." The controversy ended

indictable offence. *Brett, M. R., in Bradlaugh v. The Queen*, L. R. 3 Q. B. D. 607, 627.

(*a*) "The act of ill-speaking, it is said, implies malice. I should prefer to say an action will lie if the words are spoken *wantonly*, that is, without such occasion as would

render it right for a person to speak them; but I think the two phrases mean much the same thing. The difficulty is to determine when it becomes right for a person to speak," per Lord Blackburn in *Davies v. Snead*, L. R. 5 Q. B. 608, 611.

in the passing of Fox's Libel Act (*a*), which declared that the "whole matter put in issue" should be for the jury (*b*). On its face the statute deals only with criminal cases of libel, and it never applied to Scotland, where the criminal prosecution was unknown, and where, indeed, jury trial in civil cases was not introduced till nearly a quarter of a century later.

The same question which Fox's Act was designed to settle arose in Scotland in 1848, in a trial for sedition in connection with the Chartist agitation of that period. The verdict returned by the jury as to two of the accused was, "Find them guilty of using language *calculated* to excite popular disaffection and resistance to lawful authority" (*c*). The judge inquired, "In using the word 'calculated,' do you mean to leave out the word 'intended,' or does your verdict mean to embrace both?" The Chancellor replied, "We meant purposely to leave out the word 'intended.'" And the verdict was accordingly recorded: "The jury unanimously find Robert Hamilton guilty of sedition, in so far as that he used language calculated to excite popular disaffection and resistance to lawful authority, and by a majority of one find Henry Ranken guilty of sedition in the same terms." Objection having been made that this verdict was insufficient to support a sentence, the question was argued before six judges of the High Court (*d*). Lord Cockburn held that the verdict merely meant, "We condemn the language, but not the men; at least, whatever we may think of their intemperance, we do not

(*a*) 32 Geo. III. c. 60 (1792).

(*b*) It appears to be still an open question whether the Legislature were right in principle, or whether the judges were right. "In principle," says the M. R. (Lord Esher), "the only difference made by that statute is, that if the written instrument can be a libel, then it is for the jury to say whether it is a libel; but there remains a preliminary question which it is for the Court or

judge to decide, namely, whether the writing *can* be a libel,—whether, in truth, there is any evidence upon which the jury can say it is a libel." —*Bradlaugh v. The Queen*, L. R. 3 Q. B. D. 607, 638.

(*c*) *Lord Advocate v. Cumming*, etc., Shaw's Just. Rep. 17.

(*d*) Lord J.-C. Hope, Lords Mackenzie, Moncreiff, Medwyn, Cockburn, and Wood.

think them seditious, unless the mere uttering of the words constitutes sedition"—which his Lordship held it did not. The bare utterance, he said, might, as *evidence*, have warranted the jury in inferring *malus animus*; but as they had not inferred this, the Court had no right to make the inference for them. Lord Moncreiff, on the other hand, along with the other judges, held that it was enough to support a charge of sedition, if the acts or speeches libelled are in *their own nature* seditious, and calculated to excite disaffection and resistance to lawful authority. The prisoners received sentence of imprisonment, and so terminated the last political trial in Scotland (a).

There is, however, no doubt that in an ordinary action of defamation, the question of libel or no libel is for the jury (b).

But their verdict must be consistent with the evidence; and when it is not, a new trial will be granted (c).

Question not what Writer meant, but what do Words mean?
—In the trial of the question, the point for decision is not what the writer means, but what does his language mean?—not what he intended to say, but what has he said? Nay more, the words themselves may be harmless; yet if, in the circumstances in which they were used, reasonable men, to whom they were addressed, would understand them in a libellous sense, they are libellous (d). It is always easy, after a shot has been fired with fatal effect, for the assailant to excuse himself by saying that he meant no harm. People are taken to mean what they say. He must have spoken, knowing well that his words would be understood in an injurious sense; and if

(a) Lord Cockburn mentions in a note to his Criminal Trials in Scotland, that in 1849 Lord Campbell, who was then Lord Chief Justice of England, told him that, in his opinion, the verdict in the above case ought to have been considered an acquittal, it being just the English abortive verdict of guilty of publishing only.—Criminal Trials in Scotland, vol. ii., last page.
(b) Per Lord President (Ingliston) in *Ross v. M'Kittrick*, 14 R. 255, 262.
(c) *Ross, sup.*
(d) Per Lord Bramwell in *Capital*, etc., *Bank v. Henty*, L. R. 7 App. Ca. 741, 790.

there was room for doubt, it was his duty to take care not to make himself misunderstood. In an ordinary case of slander, no man can found on the purity of his motives and the excellence of his intentions. If the statement is true, he can prove it; if it is false, he either knew it to be false, or did not know it to be true. In the one case his conduct is malicious; in the other, he has acted with negligence in using language in disparagement of another which is not warranted by the facts.

Slander by Inadvertence.—The question whether “culpable inaccuracy” in the admitted absence of malice was sufficient to sustain the action, arose in the case of *Craig v. Hunter & Co.* in 1809 (*a*). A John Craig complained that his credit had been destroyed, from his name having been printed under a list of bankrupts by the *Glasgow Herald* instead of James Craig. It was admitted that it was a pure mistake, which had been at once corrected and apologized for. The judges concurred in opinion, that to sustain an action of damages for defamation, one of two things required to be established. Either (1) that there was malignity of intention or *animus injuriandi* on the part of the author of the verbal injury; or, (2) if there was no intention to injure, that the party complaining has sustained actual patrimonial loss in consequence of alleged inadvertence or negligence constituting the verbal injury. In this case the Court thought there had been no harm done, and assoilzied the printer and publisher of the newspaper. But in a later case against the same newspaper,—where the mistake consisted in leaving out the street and number from the name and address, “J. R., wine and spirit merchant, 251 *Gallowgate Street*, Glasgow,” so that it was applied by some people to another J. R. in another part of the town, damages were found due (*b*), and the Court rejected the plea that to sustain the action proof of special damage was necessary. Such evidence might enhance the damages; but the false

(*a*) June 29, 1809, F. C.

(*b*) *Outram v. Reid*, 14 D. 577.

announcement of the bankruptcy of any person is obviously a ground of action, even when there was no malice or *animus injuriandi* (a).

What are Actionable Words? — A verbal injury may consist in the application to a particular individual of epithets tending to his disparagement, or the false imputation of acts and conduct calculated to lower him in the estimation of his friends or the public. Coming under the former category are such expressions as thief, cheat, liar, etc., which, as they imply that the party has been guilty of dishonesty, are, notwithstanding their generality, clearly actionable; but doubt has attached to terms of more indefinite import, such as low, mean, despicable, base, infamous, disreputable, and the like. In Mr. Borthwick's time they were not considered actionable (b), and such *verba jactantia*, when spoken generally with respect to an individual,—and not to some particular transaction in which he had been concerned, and which was falsely alleged to be open to the censure expressed,—are not to be seriously considered. But Lord Chief Justice Cockburn has observed that “our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form” (c), and the Court has always been willing to act on the advice which was given from the bench in 1811. Considering the improvement in society, “the law, although it may lag a little behind the manners of the time, should follow them as hard as it can” (d).

When the imputation takes a specific form, almost all the cases will be found to range themselves into two classes. Either (1) the imputation is injurious to a man in his occupation; or (2) exposes him to hatred, contempt, ridicule, or obloquy. In the one case, he suffers in his substantial interests; in the other, the libel is

(a) See also *Shepherd v. Whitaker*, L. R. 10 C. P. 502.

(b) Borth. on Libel, 185.

(c) *Wason v. Walter*, L. R. 4 Q.

B. 73, 93.

(d) *Miller v. M'Kay*, Nov. 26, 1811, F.C.; Judges' Opinions, Borth. App. 413.

destructive of his peace of mind, and causes him to be lowered in public estimation, or shunned and avoided by his friends.

Thus, to say of a medical practitioner that he had long been beyond "the pale of professional respect and courtesy" (*a*), that he was a quack; that his treatment of a case had been marked by carelessness (*b*); of a solicitor that he was a pettifogger (*c*); of a tradesman that he was about to become bankrupt (*d*); or that his goods were an imposition, and rotten, mildewed trash (*e*), is actionable. In one case, a sensitive medical gentleman complained that his designation in the charter of a local infirmary—"Medicinæ Doctor in Aberdonia"—was translated Doctor of Medicine in Aberdeen, instead of Physician in Aberdeen. The action was sustained, but in the end the defenders were assoilzied (*f*).

Reflections upon a party's private habits and personal peculiarities, holding him up to public hatred, contempt, or ridicule, or having a tendency to make his company offensive, may also be made the subject of an action. An imputation against a female of light and improper conduct, not amounting to a positive charge of unchastity, and that some one was too intimate with her, is relevant, and in such a case unchastity and light conduct may be alternatively innuendoes in the same issue (*g*). Nor is it lawful to represent the private habits of a person to be those of a glutton and gourmand, in a series of offensive paragraphs in a local print, each, taken by itself, more ludicrous than defamatory, but all drawing public attention to the defender's personal appearance, manners, etc., although without making any imputation on his honesty or morality (*h*). Cases of this kind must necessarily largely depend upon their own circumstances.

(*a*) *Müller v. Robertson*, 15 D. 661.

(*b*) *Balfour v. Wallace*, 15 D. 913.

(*c*) *M'Vean v. Blair*, Hume, 609.

(*d*) *Lowther v. Rae*, Hume, 592.

(*e*) *Hamilton v. Arbuthnot*, M. 13,923.

(*f*) *Memis v. Jop*, M. App. Delinquency, No. 2.

(*g*) *M'Culloch v. Litt*, 13 D. 334.

(*h*) *Sheriff v. Wilson*, 17 D. 528.

In the one referred to, the Court were much moved by the pursuer being so constantly and pertinaciously made the butt of the defender's sarcasm.

To say that another is a thief (*a*), swindler, robber (*b*), poacher, or murderer (*c*); or amounting by implication to such an accusation, without its being specifically preferred, as to insinuate, in the form of an allegory, that a party aided and abetted another tried and convicted of embezzlement (*d*); or to express the opinion that he is fit to be a member of the society of Botany Bay (*e*); that twelve months' imprisonment is too good for him; that one was obliged to disgorge his ill-gotten pledges (*f*); that another is a cheat at cards; that he was the author of a calumnious letter (*g*); that a person was a common informer, or that he informed for the sake of getting the share of the penalty, is actionable; for (said the Court) though it may be perfectly legitimate to give information, an informer is by no means a popular character (*h*). To call a man a "blackguard," "bad character" (*i*), or a "vagabond" (*k*), is relevant, even without any innuendo; so, also, to charge him with hypocrisy, and selling religious tracts for the sake of gain (*l*). But "puppy" is an expression of contempt not actionable (*m*). A letter was read to a public meeting by A., stating that the writer B., when at a railway station, saw a telegraph message received for so and so, and which was to the effect, etc. No such message having been received, the telegraph keeper brought an action against both the writer and the reader of the letter, and the Court allowed an issue against both defenders as to whether it meant that the

(*a*) *M'Leans v. Grays*, Hume, 604.

(*b*) *Cairns v. Thomson*, 4 Br. Sup. 356.

(*c*) *Brownlie v. Thomson*, 21 D. 480.

(*d*) *Mackie v. Lawson*, 13 D. 725.

(*e*) *Macdonald v. Macdonald*, 2 June 1813, F. C.

(*f*) *Scouller v. Gunn*, 14 D. 920.

(*g*) *Home v. Lundie*, 10 S. 508; *Paterson v. Shaw*, 8 S. 573.

(*h*) *Graham v. Roy*, 13 D. 634.

(*i*) *Brownlie v. Thomson*, *sup.*

(*k*) *Brown v. Jamieson*, Hum 640.

(*l*) *Drummond v. Lyall and Hogg* (unreported).

(*m*) *Jameson v. Bonthorne*, 11 M. 703.

pursuer had committed a betrayal of confidence, and a violation or gross and culpable neglect of duty, by divulging, or allowing culpably to become known, to the defender the import of a certain message (*a*).

The question of publication is for the jury, and the pursuer's allegation must be specific as to persons, time, and place (*b*). But the presence of a third party is not necessary to constitute publication; for in Scotland damages are given for a slander whispered in the party's own ear (*c*), or conveyed by a letter seen by no eye but his own (*d*). A man is also responsible for slander uttered through another if by his instructions (*e*). If the slander is uttered in a foreign tongue, the *ipsissima verba* are put in issue, with the explanation, "meaning thereby in English," etc. (*f*). If there are several epithets, the pursuer is entitled to select the strongest, or those which may best suit his purpose (*g*); and should it come out in the course of the trial that the defender had used other abusive expressions in regard to the pursuer, which are not set forth in the issue, the evidence is admissible in order to show the defender's *animus* (*h*), and one witness is enough for that. The object of tying the pursuer down to a particular time and place, is to enable the defender to prove an *alibi* if he is so disposed. But the case may be one of repeated or continuous slander, in which a greater latitude is absolutely necessary. In this event, the pursuer may either take a general issue, "whether on various occasions in the month of September, October, and November 1848, in the shop of so and so," etc. (for a latitude of three months has been allowed (*i*)); or it is open to him to frame one issue, so as to state pre-

(*a*) *Richards v. Chisholme*, etc., 22 D. 215.

(*b*) *Walker v. Cumming*, 6 M. 318; *Rodger v. Macewen*, 10 D. 882; *Stephen v. Paterson*, 3 M. 571; *Broomfield v. Greig*, 6 M. 992; *Grant v. Fraser*, 8 M. 1011.

(*c*) *Mackay v. M'Cankie*, 10 R. 537.

(*d*) *Kennedy v. Baillie*, 18 D. 138; *Stuart v. Moss*, 13 R. 299.

(*e*) *Rogers v. Dick*, 1 M. 411; *Bayne v. M'Gregor*, 1 M. 615.

(*f*) *M'Laren v. Robertson*, 21 D. 183.

(*g*) *Brownlie v. Thomson*, 21 D. 480.

(*h*) *Forbes v. Kirk*, 4 D. 1177.

(*i*) *Lockhart v. Cumming*, 14 D. 452.

cisely one act of calumny, and in a second issue put it to the jury whether the defender did not say the same thing repeatedly. When this course is followed, the pursuer is not required to specify the time and place where it was repeated, if persons are named; because in continuous slander the witnesses may remember the fact, and yet forget the surrounding circumstances (*a*).

If the action is not raised during the lifetime of the wrongdoer, it may be directed against his personal representatives, because actions *ex delicto* are transmissible to the effect of obtaining compensation from the estate left behind him (*b*). Indeed, the calumny may be contained in the latter will of a person deceased; and if the executors are not liable in such a case, the individual injured would be without redress (*c*). On a like principle, it is competent for a person to vindicate the memory of his father, or other near relative, by bringing an action in respect of the scandal against the person by whom it was uttered (*d*). "Even a matter of history," it has been said, "may be a ground for claiming damages if it is injurious to descendants" (*e*).

A joint-stock company can support an action against one of its own shareholders for a libel on the company (*f*). "A bank," says Lord Ardmillan, "as a corporation, has indeed no personal feelings, and an action for mere solatium for wounded

(*a*) *Innes v. Swanson*, 20 D. 250. See, however, *Bisset v. Ecclesfield*, 2 M. 1096; and is issue of repetition necessary to entitle pursuer to prove it? *Friend v. Skelton*, 17 D. 548.

(*b*) *Auld v. Shairp*, 2 R. 191.

(*c*) A person having died leaving a deed creating a trust for certain purposes, but declaring that there should be excluded from all benefit under it "the children of Thomas and Hugh Frazer—Simeon and Levi, brethren in iniquity,"—one of these parties presented a petition to the Court, praying that the words quoted should either be expunged

from the record or declared injurious. The petition was held incompetent; but in a subsequent action of declarator, the expressions in the deed were found to be groundless and injurious, and the decret stands on the same record with the will.—*Frazer v. Spottiswood*, M. 14,978, Borthwick 169.

(*d*) Dig. de Injuriis (47-10) lex 1, § 6. See *Crawford v. Mill*, 5 Mur. 215.

(*e*) *Walker v. Robertson*, 2 Mur. 516, 519.

(*f*) *Met. Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87.

feelings is unsuitable. But a bank, sustained by public confidence, has no better heritage than credit and character; and a false accusation affecting its credit and character, and injuring it by creating distrust and alarm, is surely a wrong of a slanderous description, for which reparation may be sought" (*a*). The commanding officer of a regiment has been held entitled to claim damages from a person who called his men a regiment of cowards (*b*). Action was also sustained at the instance of the Society of Solicitors at Law, for what would now be deemed a harmless lampoon, comparing them to the "Worshipful Society of Chaldeans, Cadies, or Running Stationers of Edinburgh" (*c*). A libel on a corporation may frequently also take the form of a libel on its directors. In such an event both the company and the directors are entitled to damages (*d*), whether the individual partner suing has been mentioned in the libel by name or not (*e*). But if the slander be directed solely and exclusively against individuals, consisting, for instance, of an accusation that they are each cheating the society, this is not a slander against the society, but against themselves as individuals, for which, of course, they only have a cause of action. Thus the fleshers of Dumfries were held not entitled to complain, as a corporation, that one of the magistrates had said that "the town had been swindled out of their rents or dues from the fleshmarket" (*f*); but it was said damages might be competently claimed by any number of fleshers individually in respect of the injury done them as a body (*g*).

When the defence is that the libel had been retracted, apologised for, and forgiven, it is not necessary to take a counter issue. But if the pursuer is dissatisfied with the terms in which it is expressed, and the jury find that it was insufficient, they are entitled to disregard it, and assess the

(*a*) *North of Scot. Bank v. Duncan*, 19 D. 881, 885.

(*d*) *Hustler v. Allan & Watson*, 3 D. 366.

(*b*) *Shearlock v. Beardsworth*, 1 Mur. 196.

(*e*) *Williams v. Allan*, 3 D. 600.

(*c*) *Solicitors v. Robertson*, M. 13,935.

(*f*) *Fleshers of Dumfries v. Rankine*, 10 Dec. 1816, F. C.

(*g*) *Selkirk v. Rankin*, 2 Mur. 128.

damages as if no tender had been made (*a*). An apology means a full apology—a withdrawal of the libel in a manner sufficient to counteract the mischief it has done to the person who is the subject of it; and when it has been published in a newspaper, it is no apology to insert a contradiction in an obscure corner of the paper in small type where nobody will see it (*b*). A tender in a case of defamation, unaccompanied by an apology or retractation, does not sopite the cause of action.

Innuendo.—When the language complained of is not manifestly libellous, the person to whom it is applied is allowed to prove that it had a defamatory meaning. The speaker is not responsible for a meaning which his words do not bear; but if they are ambiguous, he must take the risk of their being understood in a defamatory sense (*c*). No one is entitled to a *protestatio contraria facti*. Having been guilty of slander, it is not for the defender to say that he did not mean it. If, for instance, he charges another with carrying away property, he will not be allowed to say he had no intention of calling him a thief. “That,” said one of the judges, “would be like pulling a man by the nose, and telling him you did not mean to insult him” (*d*).

In a phrase harmless in appearance there is often concealed some sore point, and the pursuer brings out the sting of the passage by means of an innuendo, a term borrowed from the old forms of English pleading, to comply with the rule that to make an action of slander relevant, words not actionable in their primary meaning must have a meaning assigned to them which is actionable. To entitle a party to be his own interpreter, the Court must be satisfied that the defamatory inference is one which, without doing violence to the language, may be reasonably drawn. They do not, however,

(*a*) *Campbell v. Menzies*, 17 D. 1132.

(*c*) *M'Douall v. Guthrie*, 15 D. 778.

(*b*) *Lafone v. Smith*, 4 H. & N. 159.

(*d*) Per Lord Glenlee in *Black v. Brown*, 5 S. 508, 514.

say that it is the necessary inference, or the one which the Court itself would draw. They merely decide that the words themselves, when read in the light of the circumstances in which they were published, are capable of the meaning assigned to them (a).

As words *prima facie* innocent may be shown to be defamatory, so words *prima facie* defamatory may be shown to have been understood by all who heard them in their innocent sense. In that event no damage is done, and the defender is assolizied. In one case it appeared that a schoolmistress, when reproving, in the presence of her class, a young pupil-teacher for walking too much in the street gaily dressed, called her "a street-walker," but evidently without meaning to reflect on her virtue; and she was held not liable in damages (b).

Words False, but not Slanderous, followed by Damage.—When the words, although not slanderous in themselves, have been spoken falsely with a view to prejudice, and did actually prejudice the pursuer in some particular way, an action lies. A public body, say a town council, has the gift of a contract, which is offered to public competition. They are informed that one of the competitors had said or done something which prevents them from giving him the contract. If

(a) *Kennedy v. Baillie*, 18 D. 138; *Inglis v. Inglis*, 4 M. 491; *Caldwell v. Mouro*, 10 M. 717; *Capital and Counties Bank v. Henty*, L. R. 7, App. Ca. 741. In this case the appellants (Bankers) complained that the respondents (Brewers), having quarrelled with the Bank, issued a circular to the effect that they would not receive in payment cheques drawn on any of the branches of the Bank. "Which was innuendoe to mean that said bank was not to be relied on to meet the cheques drawn on them." It was held by the House

of Lords that in their natural meaning the words were not libellous; that the inference suggested by the innuendo was not the inference which reasonable persons would draw; that the evidence, consisting of the circumstances attending the publication, failed to show it; and that there was no case to go to the jury. Lord Bramwell, at page 793, said, *Henty* might as well bring an action against a man for saying, when offered a glass of beer, "I never drink *Henty's* beer," "meaning it was bad beer!"

(b) *M'Neill v. Forbes*, 10 R. 867.

the statement was false, and produced the effect alleged, there would, says Lord Deas, be a relevant ground of damage (*a*). Any statement, whether slanderous or not, calculated to injure a man in the way of his trade, as to say that one of his shopmen was suffering from scarlet fever, or other infectious disease, which would operate to prevent people coming to the shop, entitles to redress (*b*). And in proving his damage, the pursuer is not required to point out the particular customers whom he has lost. He may not know them, and it is enough to show by general evidence a falling away in the business.

Convicium.—A third form of verbal injury is of a specially aggravated kind—the loud and public denunciation of an individual by different persons, one or more, acting in concert. To be hooted and insulted in this way on the public street is evidently a worse wrong than any form of private scandal. It may, moreover, often lead to public disturbance; and hence, while the truth of the libel is a good plea in all other cases, in this case the maxim applies—*Veritas convicii non excusat* (*c*).

Slander of Title.—Slander of Title is a fourth form of verbal injury, which, using deceit as its instrument, affects not the pursuer himself, but induces third persons to act to the pursuer's prejudice. It is evil speaking not of the man himself, but of his right to dispose of the goods or property which he claims as his own. It is not like ordinary defamation,

(*a*) *Torrance v. Weddel*, 7 M. 243.

(*b*) *Evans v. Harries*, 26 L. J. Ex. 31; *Riding v. Smith*, L. R. 1 Ex. D. 91.

(*c*) See Dig. 47. 10. 15. 4.

Cum in unum complures voces conferuntur convicium appellatur quasi convocium.

See also 47. 10. 11. 12.

Ex his apparet non omne maledictum convicium esse sed id solum quod cum vociferatione dictum est

sive unus, sive plures dixerint. In some of the earlier cases in which *veritas* was not allowed, the above distinction was recognised, although not in all; and down to *Scott v. McGavin*, 2 Mur. 484, the law was uncertain. Since then it is quite fixed that to an ordinary claim of damages for slander *veritas* is a good defence. In *Mackellar v. Duke of Sutherland*, 21 D. 222, the Lord President reviewed all the cases, and settled the point.

and the action requires actual malice as well as actual damage to support it. In the present day, the question is most generally presented in connection with the rival claims of patentees. To say that a certain machine is an infringement of your patent, and to issue a notice warning the public from buying it, may be a competent, and, in some instances, a proper proceeding; but not if you knew there were no grounds for your claim, for then the statement is morally wrong, and a malicious interference with the trade of another. If the claim is *bona fide* believed in, with or without cause, no action lies; but if it was known to be without grounds, the person making it acts in *mala fide*, and is answerable for the malicious attempt to do injury to another. The Court has extended the principle to the wrong which is done by intercepting an order intended for another (a).

Public Criticism.—The right of public discussion was first satisfactorily discussed in the case of *Scotland v. Thomson*, in which one of the ministers of Dunfermline was found liable in damages for denouncing a parishioner from the pulpit. It was pleaded that, as a clergyman "ought to preach to the times," the law recognised what was called "the liberty of the pulpit." But the Court observed, "that if on any account a minister of the gospel should think himself entitled to follow out his private resentments in the pulpit, the consequences would be dreadful" (b). On the general question, Lord Hailes remarked that "a clergyman could not with safety utter from the pulpit what the law would not permit him to utter from the Cross of Dunfermline," and laid down principles which, as regards the discussion of public affairs, place the press, the pulpit, the platform, and, in fact, common conversation, all on the same level. "A man," he said, "may utter from the pulpit whatever he may say in common conversation. If his words would not be actionable when uttered in common

(a) *Wren v. Weild*, L. R. 4 Q. B. 730; *Halsey v. Brotherhood*, L. R. 19 Ch. D. 386. (b) *Scotland v. Thomson*, Aug. 8, 1776, F. C.; M. App. 1, Delinquency, No. 3; 2 Hailes, 716.

conversation, neither will they when published from the press or from the pulpit. An exception has been made, which I approve, namely, that words faulty in themselves may be more easily excused when uttered of sudden or from provocation, than the same words will be when, after premeditation, they are printed or uttered from the pulpit. This, however, only respects the degrees of offence, not the offence itself. But to say that a man may safely print or rehearse from the pulpit, what he may not safely utter in common conversation, seems to me to be the same thing as if one should affirm that a man is at liberty to convey ideas by *marks* which he must not by sounds, and that he may say *ex suggestu* what he must not *de plano*" (a).

This right of freely discussing all matters of public interest has been sometimes treated as if it were a branch of the law of "privilege" (b), but it is obvious that the occasion of the speaking confers no privilege; it is the matter forming the subject of observation which exempts from responsibility, and the principle on which the plea truly rests is, that "public criticism is no libel" (c). It is a question for the judge, and not for the jury, whether a particular topic was or was not a matter of public interest (d); and if that be affirmed, the jury will then decide whether the article or address forming the subject of complaint exceeded the limits of fair criticism.

It is usually said that the criticism which is fair and honest never attacks an individual, but only what he has himself voluntarily submitted, expressly or by implication, to the judgment of his fellow-men; that under the guise of public comment it imputes no dishonourable motives, and seeks not to expose the secrets of his life, or invade the privacy of his home. But, supposing a man is standing as a candidate for

(a) Per Lord Hailes in *Scotland Shairp*, 2 R. 940, 949; *Merivale v. Thomson*, 2 Hailes, 669. *v. Carson*, L. R. 20 Q. B. D.

(b) *Henwood v. Harrison*, L. R. 7 275.

C. P. 606.

(d) Odgers on Libel (citing Lord

(c) Per Lord Neaves in *Auld v. Coleridge*, p. 42.

the representation of a constituency, is his past history not to be examined? And if it discloses facts incompatible with the position to which he aspires, are they not to be exposed? It is to the credit of British journalism that so few judicial utterances on this rather important point exist. Lord Neaves has observed, "that wherever an appointment of a public nature is contemplated, and, in particular, one which, besides affecting the public at large, affects a certain locality in a very strong way, the aspirant to that position lays his character and qualifications open to criticism by all who have a natural and legitimate interest in the appointment. . . . That it is a libel to say that a master in a burgh school, although a respectable and amiable man, —for there is not a word said against his morals, —is not a first-rate scholar, or has not been successful in his class, when he is aspiring to another position, and so putting himself upon a scrutiny, appears to me to be a very dangerous proposition. The man, in fact, who aspires to any public office, subjects his character and qualifications to public scrutiny, and these cannot be well discussed without referring to the facts of his past history" (*a*). But the critic should be careful of his facts. It is the function of the critic to pronounce upon facts, and the facts being admitted or uncontradicted, no one can quarrel with the commentary, however acrimonious, if in substance it is fair and honest. But to invent, suppress, or misrepresent facts, is not criticism. Thus, when a newspaper writer called attention to the negligent manner in which a minister of the Established Church was performing his duties, and alleged that he had been absent from the parish for six weeks without permission, the Court, on the ground that the fact stated was not denied, refused him an issue as to whether the article charged him with having neglected his duties and behaved in a manner unbecoming a minister of the gospel, and deserving of ecclesiastical censure. The Lord President (Inglis) said the innuendo was quite justified by the fact, if it had been false; but as that was not

alleged, the action was not maintainable (a). Nor is it within the limits of public criticism to convey a false impression of what the work is, and then denounce it as of immoral tendency. A new play was represented by a critic to have for its chief part a "naughty wife;" and there being in fact no such character in it, the author brought an action against the newspaper, on the ground that his work had been unfairly described. The questions put to the jury were: 1st, Whether the criticism bore the meaning which the plaintiffs had put upon it; and 2nd, Whether the criticism was fair and temperate;—for if it was fair, honest, independent, bold, and even exaggerated, but no more, they must find for the defendant. The jury having found that damages were due, the Court of Appeal held that the direction was right, and declined to disturb the verdict (b).

Criticism ceases when the remarks apply not to the work under review, but relate to the author's person, private character, or domestic circumstances. A person may complain that in a review he has been assailed as the author of a work which he did not write (and which had been mercilessly cut up). If the libel was not intended to apply to the pursuer, it is enough if it was so expressed as to induce people to apply it in point of fact (c).

A clergyman also may be lawfully called a very bad preacher, and for whatever injury he may suffer in consequence there is no redress; but if it is said of him (falsely) that he is immoral or dissolute in his private habits, he is entitled to damages. So a public journalist may say that a rival publication is a low, ignorant, and scurrilous journal; but if he says it has a low circulation, he must prove the fact, for that is a statement which may damage it as a commercial concern (d). We have a right to comment on the public acts

(a) *Campbell v. Ferguson*, 9 R. 1 Borth. 229; but see *Caldwell v. Monro*, 10 M. 717.

(b) *Merivale v. Carson*, *sup.*

(c) *Jardine v. Creech*, M. Ap. Del.

(d) *Carr v. Hood*, 1 Camp. 356; adopted by L. C. Com. in *Leslie v. Blackwood*, 3 Mur. 157, 166.

of a minister, upon the public acts of a general, upon the public judgments of a judge, upon the public skill of an actor; but no right to impute to them such conduct as disgraces and dishonours them in private life (*a*). If a person goes to a public meeting and expresses an opinion, the public are entitled to have that opinion and his public conduct discussed, and the publisher will be protected; but if private or personal matter is brought forward, that alters the nature of the discussion (*b*). So a book may be ridiculed to any extent, provided the reviewer keeps clear of the writer's moral character (*c*). He is not entitled to represent the conduct of the author, apart altogether from what is stated in the book, as indecorous and unseemly (*d*); nor is he at liberty to represent one of the parties to a litigation as a "sturdy, bold, and unblushing repudiator, acting, like a thimblerrigger, on the principle of 'heads I win, tails you lose,' and wishing to make money by means fair or foul" (*e*). "In regard," says Lord Deas, "to politics, and public policy, and the political principles of public men, the law of this country allows the greatest possible freedom of discussion. The liberty of the press upon these and kindred matters is invaluable and well established; but as regards private character, the conduct and principles of an individual, whether he be a merchant, a professional man, or a private gentleman, the law by no means allows the same latitude." He also observes, "It is a total mistake to suppose that a public journalist may say whatever a counsel may say in pleading a case." But the two cases have no analogy—the one being covered by the broadest privilege, while the journalist as such has no privilege whatever. His lordship's remark, that a public journalist is not entitled to publish the pleading of a counsel in a separate form, if it contains observations which the privilege of a

(*a*) *Parmiter v. Coupland*, 6 M. 284, 291; *McEwan v. Magistrates of* and W. 105. See also Cobbet's case, *Edinburgh*, M. 3434.

in the Court of King's Bench, 1804, (*c*) *Leslie v. Blackwood*, *sup.*

29 Howell's St. Tr. 1; *Hamilton v.* (*d*) *Davis v. Miller*, 17 D. 1050.

Stevenson, 3 Mur. 75.

(*e*) *Drew v. Mackenzie & Co.*, 24

(*b*) *Aiton v. McCulloch*, 3 Mur. D. 649.

counsel was necessary to protect, is equally beside the question, and doubtful law. It may be added, that where the editor or publisher of a newspaper is willing to take the sole responsibility of a libel, he cannot be compelled to disclose the name of the author (*a*); and there is no pretence for distinguishing between an editorial and a letter to the editor, signed Junius, Publicola, or Scrutator, according to the fancy of the contributor.

On similar grounds, damages have been repeatedly awarded against clergymen for applying to individual members of the congregation expressions contrary to the decency, dignity, and purity of the pulpit. Thus, action has been sustained for denouncing certain persons as vicious and abandoned, the authors of a riot, and guilty of a mock celebration of the sacrament (*b*); for saying a certain gentleman defrauded the poor, and never sat down to the Lord's table (*c*); for stating in the pulpit that a certain newspaper was edited by an "infidel villain" (*d*); for calling the schoolmaster illiterate and ill-educated, and unfit for the place (*e*); for saying that a certain paper which had been put into the plate was a tissue of "falsehood, misrepresentation, and bad grammar"—that the author was ignorant of his catechism, and it was easy for those deficient in their own duty to find fault with others (*f*). The pulpit is obviously not the place for such language, and it is not necessary to the spiritual interests of the public that private character should be thus assailed.

What is "fair" is what the jury, in all the circumstances, after reading the article, may consider such; and it is nowhere exactly defined. The nearest approach to a definition was given by Lord Tenterden: "Whatever is fair, and can be reasonably said of the works of authors, or of themselves as connected with their works, is not actionable, unless it

(*a*) *Lowe v. Taylor*, 5 D. 1261. But see *Brims v. Reid & Son*, 12 R. 1016. (*d*) *Adam v. Allan*, 3 D. 1058.
 (*b*) *Snodgrass v. Wotherspoon*, 5 648. (*e*) *Cooper v. Greig*, Hume,
 B. Sup. 573. (*f*) *Dudgeon v. Forbes*, 10 S.
 (*c*) *Walker v. Robertson*, 2 Mur. 508. 810.

appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author; and then it will be a libel "(a). A man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it is left to the jury to say whether the *mode of expression* exceeds the limit of fair criticism (b). However false and absurd may be the views expressed, and however prejudiced may be the writer, he is entitled to express them, if the jury were satisfied that they were honestly entertained, and expressed with a reasonable degree of judgment and moderation (c).

Compensatio Injuriarum. — Provocation has always been admitted in mitigation of damages in actions of slander. It is said in a work of authority, that where the pursuer has committed the first offence, the defender will not be liable in reparation to him, if he has not greatly exceeded the limits of just defence, and even of excusable retaliation (d). Allied with this is a plea peculiar to the law of Scotland, called *compensatio injuriarum*, which in the case of *Gilchrist v. Dempster*, tried at Inverness in 1823, was thus explained by the presiding judge, Lord Gillies (e): "The defender says, though I injured you, you have committed as great an injury against me; this is fair, and is allowed without any separate action where the injuries are of *the same kind*." The jury were there allowed to take into account certain opprobrious words spoken extrajudicially by the pursuer, as an answer to damages claimed from the defender for judicial slander, inserted by him in his own hand in a pleading before the sheriff; and the jury balanced the account by returning a verdict for one shilling, which did not carry costs. In this case there was no counter issue; and on the last occasion in

(a) *M'Leod v. Wakley*, 3 C. & P. 311, 313; *Campbell v. Spottiswoode*, 3 B. & S. 769; *Davis v. Duncan*, L. R. 9 C. P. 396.

(b) Per L. J. Bowen in *Merivale v. Carson*, *sup.* 283.

(c) *Wason v. Walter*, L. R. 4 Q. B. 73, 96.

(d) *Ferguson*, Consist. Law, 245.

(e) Reported by Borthwick, 433.

which a counter issue was asked, it was refused (*a*). In a previous case, the jury were told from the bench that the defamatory statements on either side so nearly balanced each other as to throw the damages out of sight, and the judges (Lord C. C. Adam and Lord Gillies) were clearly of opinion that the compensation was made out, and that there ought to be a verdict for the defender. It will thus be seen that the plea of compensation does not operate as a bar to the action or an excuse for the defender's conduct. In substance and effect, it means that the pursuer gave as good as he got, and that, putting what was done on the one side against what was done on the other, the result is to mitigate the damages down to nothing, or at least to a comparatively small sum.

The plea has been borrowed from the Roman law, which allowed one debt to be set off against another, and so *ipso facto* operate their mutual extinction.—“sive ex pari, sive ex diversa causa, sive ex contractu, sive ex delicto.” Before the institution of jury trial, the forms in use in the Court of Session enabled the judges to deal with the parties when both were to blame with a free hand. They not only applied the plea, but encouraged its application, so as to enable them to deal with the beginning and end of the quarrel without compelling the defender to bring a separate action. Where a defamatory sermon gave rise to a libellous letter in the *Caledonian Mercury*, and the preacher retaliated with a second sermon, on which an action was raised, (Thomson) the minister pleaded the newspaper as compensation; and Scotland (the pursuer) pleaded the first sermon as recompensation; the legal result, it was argued, being that the one cancelled the other. In the end, two pursuers were awarded £25 jointly, while to the third £5 only was given in respect of the letter sent to the *Mercury* (*b*). In the case of *Izat* in 1781, it was found that the pursuer acted improperly in publishing his libel, but that the defenders acted more improperly—so

(*a*) *Tullis v. Crichton*, 12 D. 867; 1776. F. C., Borth. p. 283: *Porteous v. Bertram*, 12 R. 798. *Izat*, M. 13,937.

(*b*) *Scotland v. Thomson*, Aug. 8,

the interlocutor was expressed—in publishing his virulent and acrimonious paper; and as the defender's conduct had been thus exculpated and alleviated in part by the pursuer's own conduct, the damages were modified to £5.

In the case of *Edwards v. Macintosh* in 1824, there was a plea of *compensatio injuriarum*, and a counter issue had been taken, but at the trial the Lord Chief Commissioner (clearly under a false impression that the law of Scotland was the same as the law of England in this matter) refused to send the counter issue to trial. On a motion for a new trial, the case was heard before the Lord Chief Commissioner, Lord Pitmilley, and Lord Gillies, and the Court decided that the plea ought to have been submitted to the jury. But as the evidence had been led, and a verdict found in favour of the pursuer for £700 of damages, the Court, instead of sending the case to be tried over again, allowed the verdict to stand, with leave to the defender to bring another action at his own instance for the injury which he had sustained. Of course, when there are separate actions, issues are adjusted in each, and they are tried at the same time and by the same jury.

The injuries founded on by way of compensation were usually concurrent with the injury which formed the subject of the suit, but not necessarily so. In *Edwards* it was anterior, the defender's case being that he had been provoked to utter the language complained of by the pursuer (*a*). More commonly it was all one quarrel, like those actions in the Small Debt Court, or before Her Majesty's Justices of the Peace, where a scolding match is the cause of action (*b*).

A pursuer who brings an action of damages for defamation, is understood to put his character in issue. "A person," says Bankton, "of an abject character can hardly suffer by a verbal injury, because he has no reputation to lose" (*c*).

(*a*) *Edwards v. Macintosh*, 3 Mur. 369, 379. See Lord Moncreiff's criticism on the course followed in the case of *Edwards* in *Tullis v. Crichton*, *sup.* 876, Borth. 289.

(*b*) *Chalmers v. Baillie*, 1785, Borth. 281.

(*c*) Inst. 1. 10. 25, Borth. 307; *Hyslop v. Staig*, 1 Mur. 15, 21; *Hyslop v. Miller*, 1 Mur. 43, 49.

Evidence of *mala fama*, not amounting to justification, has been admitted in mitigation of damages. In one of the earliest cases which occurred after the introduction of jury trial, the defender came prepared to prove the truth of the charges on which the action had been brought. The presiding judge said that he could not do so without an issue; but added, "he might, without an issue, have proved that the thing was generally propagated before he stated it, and that the pursuer was of such a character as not to be injured by such a statement" (a). It is doubtful, however, how far this is now law. A pursuer claiming damages for a verbal injury has, of course, to submit to cross-examination as to events in his past history; but where no issue in justification has been taken, it is difficult to see how facts not amounting to a complete justification are admissible in reduction of damages, or indeed for any purpose whatever. Suppose a man has an evil reputation, that is no excuse for making him the subject of an unfounded attack, and charging him with conduct of which he has not been guilty. If, again, the evidence is of rumours and suspicions, tending to show that the charge was *probably* true, or of particular facts affecting the pursuer's disposition, it would appear to have still less bearing on the issue (b).

Accordingly it is now settled—(1) Where the defender is not prepared to justify his words by proving their truth, evidence of their truth cannot be received in mitigation of damages. But (2) the *res gestæ* may be inquired into (without a counter issue) when the object is to prove provocation or conduct on the part of the pursuer, excusing but not justifying the slander (c).

(a) *Walker v. Robertson*, 2 Mur. 508. (c) *M'Neil v. Rorison*, 10 D. 15; *Torrance v. Waddell*, 7 M. 243;

(b) See *Scott v. Sampson*, L. R. 8 Q. B. D. 491; and *contra Wood v. Craig v. Jex Blake*, 9 M. 973; *Paul v. Jackson*, 11 R. 460. *Lord Durham*, 4 Times Rep. 778.

PRIVILEGED SLANDER.

Thus far when the case is one of unprivileged slander; when it is privileged, the defence afforded by the plea is either absolute or qualified.

Absolute Privilege.—*Government Publications.*—A Secretary of State is not liable for a libellous notice published by him in the course of his official duty as one of the Ministers of the Crown. It follows that all notices in the *Gazette* (which is the official organ of the Government) are protected, even when the official responsible is alleged to have acted with malice. And so also has it been held with respect to the Lord Advocate (*a*).

Parliamentary Papers.—By statute, no proceedings, civil or criminal, may be taken for the publication of papers printed by order of Parliament, or any extract from or abstract thereof, when the same has been published *bona fide* and without malice (*b*).

Newspaper Reports.—*Parliamentary Debates.*—It is essential to the working of our Parliamentary system, that faithful reports of the proceedings in both Houses should be published in the newspapers; and as there is freedom within the walls of Parliament for saying whatever a member deems it his duty to say, any one is at liberty to publish the debates without rendering himself liable to an action for matter spoken to the prejudice of an individual (*c*).

Courts of Justice.—The Courts of justice are open to the public, and a fair report of the proceedings is considered so

(*a*) *Grant v. Secy. of State for India*, L. R. 2 C. P. D. 445; consequence of the decision in *Stockdale v. Hansard*, 9 Ad. & E. 1.
 (*c*) *Wason v. Walter*, L. R. 4 Q. B. 73.

much to the general advantage of the country, and the pure administration of justice, as to counterbalance the inconvenience to private persons, whose conduct (perhaps unjustly) is called in question before a Court of law (*a*). In the course of legal proceedings, many things may be said and done that would have been better left unsaid and not done; but, as the Lord President says, "the publication of a fair and accurate report of these things cannot be prevented." Any inquiry into the *animus injuriandi* is therefore irrelevant; but it must be a true report,—not necessarily a full report, setting everything out,—but a correct report, prepared with the honest intention of making the true facts of the case known. With a daily press a long trial has to be published from day to day, with the result, as sometimes happens, that one side only is given at a time. But it has been decided that this practice is not illegal,—at least, when complaint is made that part only of the proceedings has been given, it is necessary, to make the action relevant, to show that it was done out of malice (*b*).

A newspaper, however, is not entitled to print all the papers which may be laid before the judge in the course of the suit. The reporter takes notes, as one of the public, of what is publicly urged on both sides, and which the public are entitled to know. But writings printed *ex parte*, and a summons called in Court but on which nothing more has followed, are not public documents; and in one case the newspaper which had got hold of a summons and printed it before the case had been moved in, was held answerable as in an unprivileged case of slander (*c*).

Public Meetings.—The principle which underlies the cases in which it has been found to be lawful for a newspaper to publish a fair and faithful report of what passes in Parliament or in a Court of law without incurring responsibility, is really

(*a*) *Curry v. Walter*, 1 B. & P. 537; *Knight v. Macdougall*, L. R. 525; *Riddell v. Clydesdale Horse* 17 Q. B. D. 636.
Society, 12 R. 976.

(*c*) *Richardson v. Wilson*, 7 R.

(*b*) *Lewis v. Levy*, E. B. & E. 237.

—*public interest*. The only foundation for the exception is that the superior public benefit counterbalances the possibility of harm coming to individuals. The same reason (it is submitted) is equally applicable to reports of the proceedings of all public bodies. If publicity is essential to wise legislation and the due administration of justice, it is still more necessary for the efficient performance of important public duties by town councils, local government boards, and other administrative bodies. It is not easy to see why reports of these local boards, and, indeed, of all public meetings lawfully convened for the discussion of matters affecting the public welfare, should not also be protected. Protection was given to the newspaper press with respect to Parliamentary debates, because it was felt that publicity had become “essential to the maintenance of the relations subsisting between the Government, the Legislature, and the country at large” (a); and if the common law sanctions any such principle, it cannot stop short of what is now suggested. The recognition of the principle even in its limited form is, however, of comparatively recent date. How far a newspaper is responsible for a *bona fide* report of a public meeting, has never been discussed in Scotland; but in one case in England (on somewhat narrow grounds) it has been held that for the publication of matter defamatory to an individual in the report of a public meeting, fair and *bona fide*, a newspaper had no protection (b); and the subject is now regulated by a statute which does not extend to Scotland (c).

It is not unlawful for a newspaper to copy and print for circulation amongst its subscribers the contents of public registers, the names appearing in the lists of protested bills (d), of decreets in absence, etc. (e), provided the list is unaccompanied by any reference to individuals capable of being read in a slanderous sense.

(a) *Wason v. Walter*, *sup.* 89.

(d) *Fleming v. Newton*, 6 Bell's

(b) *Davison v. Duncan*, 7 El. & Ap. 175.

Bl. 229.

(e) *Andrews v. Drummond & Graham*, 14 R. 568.

(c) 44 & 45 Vict. c. 60.

Judicial Privilege.—*Judges.*—Everything which a judge says on the bench, a witness in the box, and also (probably) a counsel in arguing the cause, is protected absolutely. If a judge forgets his high position, he is answerable for his conduct to the House of Commons; if a witness swears falsely, he is liable to the pains of perjury; if a counsel travels beyond the record, he may be checked and censured: and, subject to these restrictions, the privilege is so rarely abused, that it has been deemed wise for the public interest, that out of the proceedings of Courts of law, actions of damages should under no circumstances be maintainable. Occasionally individuals may suffer, but the inconvenience is not great compared with the benefit which the public derive from having judges of independence; witnesses not afraid to speak the truth; and a bar who act under a feeling of public responsibility, and are undeterred from the proper performance of their duties by a dread of actions of damages.

It is only of late years that the rule has been rested on this broad basis of public interest. About fifty years ago it was applied to the case of one of the supreme judges in *Haggart's Trs. v. Hope* (a). In *Robertson v. Barclay* (b), Lord Wynford expressed the opinion that a subordinate judge stood in a different position, and was liable to an action for slander if motive was clearly made out. In this case the defender was a justice of peace, who, in trying a poacher, said, "I do not think the defender deserves any mercy, as *I am* informed that, besides being a poacher he is a thief, and has been known to steal beehives and leather." The case was three times tried, and finally ended in a verdict for the defender, upon a direction which was upheld by the Court and the House of Lords. The Court drew a distinction between an act of competent judicial censure and an act of slander altogether needless and gratuitous. For the former no action could be brought; for the latter the magistrate was answerable, provided it was shown by evidence other than the words themselves that the

(a) 2 Sh. App. Ca. 125.

(b) 4 W. S. 102.

words were spoken maliciously (*a*). But since then this distinction has been found to be erroneous, and the same privilege which is possessed by supreme judges has been adjudged to belong to a sheriff-substitute (*b*) and a County Court judge (*c*).

Witness.—It is just as necessary that a witness should be free to bear his testimony without any anxiety as to what may happen to him for telling the truth. He is not a volunteer: like the judge, he is engaged in a public duty: and he is not answerable in a civil action for anything he may say on oath—however false or malicious it may be. Moreover, the second action, if permitted, would practically be a re-trial of the main one. The interest of the individual is therefore again subordinated to the higher interests of public justice; and it is a privilege possessed by all persons engaged in the office of bearing testimony—to a witness before a Court of law, a military Court of inquiry (although not on oath), and a Select Committee of one of the Houses of Parliament (*d*).

Litigant.—It is the privilege of every member of the public to submit his supposed claims and grievances to judicial decision, subject to the penalty of being found liable in expenses in the event of the action being unsuccessful. Under some systems of law, when a civil suit is commenced and prosecuted maliciously, and without reasonable and probable cause, the successful litigant is entitled to recover as damages the costs which he is out of pocket, in addition to his taxed costs (*e*). But with us he must be satisfied with getting the groundless action dismissed, and is allowed nothing beyond the amount decerned for in name of expenses, in the decree which has been pronounced in his favour.

If, however, a litigant has made allegations affecting the

(*a*) *Robertson v. Barclay, etc.*, 6 S. 242; 4 Mur. 509, 534, 7 S. 601; 5 Mur. 326.

(*b*) *Hamilton v. Anderson*, 3 Macq. 363; *Harvey v. Dyce*, 4 R. 265.

(*c*) *Scott v. Stansfield*, L. R. 3 Ex. 220.

(*d*) *M'Intosh v. Weir*, 2 R. 877; *Seaman v. Netherclift*, L. R. 2 C. P. D. 53; *Dawkins v. Ld. Rokeby*, L. R. 7 H. L. 744; *Goffin v. Donnelly*, L. R. 6 Q. B. D. 307.

(*e*) *Moak's Torts*, 162.

moral character of his adversary, or of a third person no party to the record, he may be called on to answer for the slander, under an issue putting the question whether the statements are false and calumnious, and were maliciously inserted in the condescendence to the pursuer's loss and damage. In a case between two writers before the Sheriff of Lanarkshire, in which the pursuer had been charged with attempting to suborn witnesses, and described as a "man who might be justly proud of the name of pettifogger," the defender was found to have rendered himself liable in damages by having so far exceeded the privileges of debate in a Court of justice (*a*).

In this case the slanderous passage in the pleading was neither relevant nor pertinent; and the bare fact that an assertion is foreign to the cause, suggests a design to injure. It does not follow, however, that it was malicious, for the party himself may have believed it to be pertinent. The question for the jury is whether this is so, or whether it was inserted not to forward the cause, but solely for the purpose of venting his malice (*b*). When the statement complained of is not open to the exception of irrelevancy, no question of pertinence arises; the party is within his privilege as a litigant, and to displace it, it is not sufficient for the pursuer of the action to aver the existence of malice, he must show the facts from which it may be inferred—a groundlessness in fact importing malice (*c*).

In former times, when a litigant abused his privilege by casting aspersions on some third party, the Court ordered the offensive passage to be struck out and the litigant fined. But the practice was checked by the House of Lords, where it was remarked that for the sake of the general interests of justice, and the fair discussion of matters in dispute between man and man, great freedom of allegation must be allowed; "and when

(*a*) *Gordon v. Br. & Foreign Metaline Co.*, 14 R. 75; *Dougal v. Watson*, Borth. 331. by Lord Balgray in *Forteith v. Fife*, Nov. 18, 1819, F. C.; *Mackellar v. D. of Sutherland*, 21 D. 222.

(*b*) *Gilchrist v. Dempster*, Borth. 433; Bank. Inst. 1. 10. 33, appd. (*c*) *Scott v. Turnbull*, 11 R. 1131.

it was necessary to introduce names, the evil must be submitted to till it can be seen whether the allegation is really wanton scandal or whether it is pertinent matter, bearing hard for the time but no longer than till the case is inquired into" (a). A husband having instituted a process of adultery against his wife unsuccessfully, was found liable in damages to the two alleged "co-respondents," as we should now call them; in a reduction of sale of lands, the widow of the last proprietor was found entitled to damages for a statement reflecting on her virtue; and in *Forteth v. Fife*, a witness in a former suit was found entitled to damages for the terms in which the defender's counsel (Mr. Jeffrey) impeached his veracity, the language being alleged to be malicious (b).

In this last case the action was not directed against the counsel, but the client. In an earlier case an action was sustained against a clergyman who had assisted in the preparation of pleadings in a case containing irrelevant and defamatory matter; and it has never yet been decided in Scotland that counsel are not subject to an action for words spoken, during the conduct of case, which are irrelevant, *mala fide*, and spoken with malice (c). Mr. Borthwick favours the view which is expressed by Blackstone in his Commentaries, that a "counsel is not answerable for any matter by him spoken, relative to the cause in hand, and suggested in his client's instructions;" and in a modern case an action was held to be properly directed against the agent, where it was alleged (but not proved) that the statement was made by counsel on instructions maliciously given by the agent (d). "But if," says Blackstone, "he mentions an untruth of his own invention, or even upon his instructions if it be impertinent

(a) *Henderson v. Young* (1774), Elch.; *Robertson v. Graham*, 3 Dow, 273.

(b) *Græme & Skene v. Cunningham*, M. 13,923; *M'Vane v. M'Alpine*, Borth. 386; *Forteth v. Fife*, 18 Nov. 1819, F. C. The action was first dismissed for want

of an allegation of malice; a second action went to trial, and ended in a verdict for the defender, reported in 2 Mur. 463.

(c) *Robertson v. Rose*, Borth. 340, Bl. Com. iii. c. 3, Borth. 214.

(d) *Bayne v. M'Gregor*, 24 D. 1126.

to the cause in hand, he is then liable to an action from the party injured." This, however, is opposed to a dictum of Lord Mansfield, pronounced more than a hundred years ago—"that neither party, witness, counsel, jury, nor judge, can be put to answer, civilly or criminally, for words spoken in office" (a);—an opinion in later cases repeated and rested on the broad ground that however false, malicious, or injurious might be the language forming the subject of complaint, counsel enjoyed the same absolute immunity as was possessed by judges, witnesses, by members of the Legislature, and by Ministers of the Crown in advising the sovereign; "it is absolutely privileged, and cannot be inquired into in an action at law for defamation" (b). These opinions were, however, pronounced *obiter*, and it was not until the case of *Munster v. Lamb* in 1883, that the question was formally determined (c). This was an action brought against a solicitor, who, in defending a prisoner before the Recorder, made certain charges against the plaintiff (who had been prosecutor) which were said to be false and malicious. It was held that the question of malice, *bona fides*, and relevancy could not be raised; the only question is whether what is complained of has been said in the course of the administration of the law. Of the three classes—judge, witness, counsel—the latter had special need to have his mind free from all anxiety. He knows nothing of the case except what is told him; and if, said the Master of the Rolls (Brett), "he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform." It was also observed that the rule of law exists, not because the conduct of a judge who disgraces his office by using from the bench words of defamation falsely and maliciously, and without reasonable or probable cause, ought not to be liable to an

(a) *R. v. Skinner*, Loft's K. B. Reps. 55, 56.

(b) *Dawkins v. Ld. Rokeby*, L. R. 8 Q. B. 255, 263.

(c) L. R. 11 Q. B. D. 588, 604.

action, but because if such conduct was actionable, numerous actions would be brought against persons who were merely doing their duty (*a*).

Qualified Privilege.—This form of privilege is due to the fact that while a person having no call or occasion to speak of another may be reasonably supposed to have spoken wantonly—either from no motive at all, or a motive worse than none, which the law calls malice, there are many situations in which one man is obliged to speak of another, when he would willingly avoid it if he could, and in that case he shall only be answerable if malice is shown to have existed in fact. The burden is thrown on the pursuer of the action of proving malice. The privileged character of the occasion prevents the inference of malice which would be drawn from the language itself were it unauthorized, and affords a qualified defence depending on the absence of actual malice, or *mala fides*.

Whether privilege exists or not, is always a question of law; and if it arises on the admitted facts of the case, it is put in issue by the Court. If not, the case is sent to trial without malice in the issue; and should the judge be of opinion that the evidence shows privilege, he will direct the jury that they cannot find for the pursuer without proof of malice in fact (*b*). If, again, malice is in issue, but the evidence discloses a case different from what is presented in the record, and the judge is of opinion that there is no privilege, he will direct the jury to find for the pursuer without proof of malice. It is not necessary for the pursuer to give evidence of malice as part of his case, unless it turn out to be one of privilege soon after the opening. The privilege may be disclosed for the first time in the proof for the defenders, and in such a case the proper time for the proof of malice may be after the defender's evidence has been led (*c*).

(*a*) Per Fry, L. J., *sup.* 607.

(*b*) *Fenton v. Currie*, 5 D. 705; (*c*) Per Ld. Pres. (Inglis) in *Rankine v. Roberts*, 1 R. 225, 228.

M'Bride v. Williams, 7 M. 427.

A communication made *bona fide* on any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although without the privilege it would be slanderous and actionable (a). The duty here spoken of is a duty, legal, social, or moral, and includes the obligation which attaches to every one to tell what he knows whenever he is so situated, that it becomes right in the interests of society, that some third person should be informed of certain facts, or what the speaker believes to be facts (b).

Right of Petition and Complaints against Officials.—As it is obviously for the public interest that the conduct of persons occupying positions of public trust should be subject to the closest scrutiny, a large latitude is allowed to a private party in presenting petitions to the Queen and the two Houses of Parliament, and in making formal complaints to the great officers of State respecting the conduct of magistrates, officers of the army, and generally all persons engaged in the public service (c). The complaint, however, should not be made on frivolous grounds and without due inquiry. Responsibility arising from a knowledge that a statement is untrue, is evidently much the same as that which comes from not knowing whether it is true or false; and if the complaint is so groundless as to afford evidence that the author of it knew and believed it to be untrue, he may be taken to have been influenced by malicious motives in making the complaint. But where there is no evidence from which it can be inferred that he was acting otherwise than in the *bona fide* discharge of what he conceived to be his duty, the action will not lie,

(a) *Shairp*, 2 R. 940, 946 (Lord Moncreiff). moral or social duty; *Waller v. Loch*, L. R. 7 Q. B. D. 619, 621.

(b) Per Ld. Blackburn in *Davies v. Sneed*, L. R. 5 Q. B. 608, 611. Sir G. Jessel would have extended privilege to every case where the person giving the information *bona fide* thinks that he is discharging a (c) A person who accuses a public official of malversation is supposed to be actuated by zeal for the public good. *Thompson v. Gillie*, 16 May 1810, F. C.; *Young v. Leven*, 1 S. Ap. 179.

even when a mistake is made in sending the memorial to the wrong department (a). A memorial, by several inhabitants of a district, was addressed to the Home Secretary, complaining of the conduct of a justice of the peace, and praying the Secretary to make inquiry with a view to his removal from the commission of the peace. It was held that the jury, having found that the defendants acted in *bona fide*, they were not liable in damages to the justice; for although they should have addressed the Keeper of the Great Seal instead of the Home Secretary, still it was substantially a memorial to the Crown, as the Home Secretary might transmit it to the proper department (b).

Official Investigations.—When an officer is directed by his superiors to make an official investigation into the conduct of another, he is in the possession of a *prima facie* privilege, if the inquiry be rightly conducted (c). The pursuer must therefore take an issue of malice; but if at the trial it turns out that the defender went beyond his duty, and that his conduct was irregular and illegal, the pursuer, even under such an issue, will be entitled to a verdict (d). The protection extends not only to the parties making the investigation, but to those whom they require to examine. Thus, a statement made by an inferior officer of Customs, in presence of other Custom-house officers, and in the course of an investigation, at which both parties had been summoned to attend, was found to entitle the defender to a verdict, unless express malice was proved (e).

But official documents reflecting on the conduct of individuals, or importing that they had been guilty of a breach of the law, must not be needlessly and ultroneously published by those into whose hands they may chance to come. The circulation by A. B. of an official letter from the Stamp Office,

(a) *Hart v. Gumpach*, L. R. 4 P. C. 439.

(b) *Harrison v. Bush*, 5 E. & B. 344; *Proctor v. Webster*, L. R. 16 Q. B. D. 112.

(c) *Blackett v. Lang*, 16 D. 989.

(d) *Ibid.*

(e) *Fenton v. Currie*, 5 D. 705.

addressed to him, and conveying a charge of having been guilty of a breach of the Stamp Laws by granting an unstamped receipt to C. D., will support an action at the instance of C. D., on the ground that it was maliciously designed to convey the impression that the pursuer C. D. had given the information to the Stamp Office, and was a common informer (a).

An official report, prepared in circumstances importing privilege, is sometimes transmitted to the newspapers for publication, and the question which then arises is whether the fact of publication is consistent with the continuance of *bona fides*, which the jury will decide on a review of all the circumstances. In a case in the Privy Council, the Bishop of the Isle of Man, after defending himself, in a speech to his clergy in Synod, from an attack which had been made upon him in the local legislature, was held entitled to send his speech to the newspapers. Their lordships thought that the vindication of his character in this way, from the aspersions which had been cast upon it, was both natural and justifiable (b).

Public Boards.—Every member of a public board is entitled to express an opinion on the matters properly before it. In doing so, he stands in a privileged situation, and is allowed much freedom of observation. However strong his language, the presumption of law is in favour of the innocence of his intentions; and therefore malice must be averred and proved (c). The same protection is extended to the board itself, and its committees (d). “If,” says Lord Moncreiff, “in the conduct of public business any member of a public body, which is deliberating for the public benefit, thinks it right, in the public interest, to make use of expressions pertinent to the matter in hand, though they may bear hardly on indi-

(a) *Kennedy v. Allan*, 10 D. 1293.

(c) *Hamilton v. Hope*, 5 S. 569, 4 Mur. 222.

(b) *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495.

(d) *Mackay v. Chalmers*, 21 D. 443.

viduals, that occasion is nevertheless privileged, unless malice be proved" (*a*). In one case (*b*), where the speech delivered was addressed to a meeting of contributors to the Royal Infirmary, and the slander consisted in imputing drunkenness to the pursuer of the action (who did not deny that he had been present in a riotous assembly of students, and the subject of the riot was admittedly before the meeting), this principle was denied; and in another case (*c*), arising out of a discussion at a parochial board, the offending member appears to have been refused the protection to which, from his official position, he was entitled. But at the date of these cases the tendency rather was to place the defence of privilege within much narrower limits than are now recognised. "There has been," says Lord Young, "a considerable variety of decision in this branch of the law. . . . There had been an advance before 1871, and there has been an advance since" (*d*). The privilege has been conferred in the public interest, and a town council may be taken as a typical instance of its exercise. But if the member can be shown to have abused his position for the purpose of calumniating others,—by proof that the statement was not only not true, but that he had no reasonable ground for believing it to be so,—the privilege is avoided, and the member becomes responsible. The observations of the defender, if they are to be privileged, must also be pertinent to the matter before the board (*e*). A member of a local board of health, having no occasion to express an opinion of another's fitness or unfitness for the magistracy, had no protection for saying that a candidate for the magistracy had used a public institution as a common brothel (*f*).

Community of Interest.—An illustration of the *interest* in the subject of the communication sufficient to confer privilege,

(*a*) *Shaw v. Morgan*, 15 R. 865. Limitation clause of the Poor Law

(*b*) *Craig v. Jex Blake*, 9 M. Act, but the point was not taken.
973.

(*d*) *Shaw v. Morgan*, *sup.* 871.

(*c*) *Rae v. M'Lay*, 14 D. 988. (*e*) *Newlands v. Shaw*, 12 S. 550.

This action was excluded by the (*f*) *Fraser v. Wilson*, 13 D. 289.

is when three persons having arranged that A. shall supply B. with goods on the security of C., A. complains to C. that B.'s conduct is irregular or dishonest. It is manifest that the business of life could not proceed if people were not at liberty to make communications of this nature without the dread of being called on to justify every statement made by actual proof; and accordingly the privilege was established in a remarkable case which occurred towards the end of last century. A farmer discovered in the mill, where he was accustomed to get his grain ground into meal, a contrivance by which the miller abstracted for his own use a part of all the grain which he received to be ground. He immediately communicated his discovery to all who used the mill, those thirled to it as well as those who were not; and the miller sued him for damages before the Sheriff, who held the case to be privileged, on the ground that, having been himself defrauded, he was entitled to communicate his discovery to all who had an interest to be made acquainted with the fact. The miller denied the existence of the contrivance, but argued that, whether the fact was true or false, the defender had no right to check the evil by the method he had adopted. But, on the case being appealed, the supreme Court affirmed the decision of the Sheriff, and held the case to be one of privilege (a). On the same principle, the shareholders in a public company may meet and discuss the affairs in which they have all a common interest, but not in presence of the public, or at a meeting at which the press has been invited to attend (b); and it is within their privilege for the auditors to prepare, and the directors to print and circulate, for the information of the company, a report containing reflections on the conduct of any of their officials (c). Every shareholder is entitled to know how the company's affairs are being administered; and it is the function of the directors to investigate charges affecting their officials and communicate the result, provided

(a) *Inglis v. Calder*, Borth. 236.

(c) *Lawless v. Anglo-Egyptian*

(b) *Parsons v. Surgey*, 4 F. & F. Co., L. R. 4 Q. B. 262.

they do so *bona fide* and without malice. But if the report is distributed in a form which gives it unnecessary publicity,—as, for instance, when it is printed in the shape of a pamphlet, and sold to the public, or circulated among their employés,—the fact would be evidence of malice which would render them liable (a). Where the managers of a marine insurance society, formed on the mutual principle, intimated to the owner of one of the vessels on their list, that if a certain person was allowed to take the command of her, they would refuse to continue to insure her (for reasons affecting the captain), the communication was held to be made in a matter in which they had an interest, and justified by the information they had received, and so not actionable (b).

These cases show that privilege, when it does exist, is subject to this reasonable qualification, that the person making the communication should proceed with a due regard to the interests of the person whose conduct is impeached, and who has not yet been proved to be guilty. Where a member of a congregation stated to one of the elders openly in his shop, and in the presence of another person, that the session-clerk had been drunk and incapable on a certain night, the statement was held not to be privileged, although, if the charge had been contained in a letter written to the minister with a view to his investigating the matter, the statement would have been privileged. In the latter case he is considered as exercising a right, and it may be performing a duty, and although the charge he makes turns out to be unfounded, he is not necessarily liable in damages, because his privilege protects him, unless malice is proved; but in the other case, the slander having been uttered by the defender in the shop, and in the presence of a stranger, it was manifest that it was uttered not as a communication with a view to discipline or as a step towards a complaint to the kirk-session, but either with an

(a) *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Quigley*, Ca. 247.
(b) *Hamon v. Falle*, L. R. 4 App. 21 Howard, U.S. 202.

intent to injure, or perhaps without intent to injure, with the necessary result of injury (a).

It thus appears that the conditions on which this privilege may be exercised without inferring an improper motive are—(1) that the fact forming the subject of the communication, whether true or false, is at least believed to be true; (2) it is not communicated to any but those who have an interest to know it; and (3) the communication is not expressed in terms exceeding the bounds of reasonable moderation.

Creditors enjoy the like liberty in discussing the conduct of the bankrupt, and matters affecting the estate. A bankrupt, who complained that certain of his creditors had circulated letters among each other for the purpose of forming an opposition against a proposed offer of composition, on the ground that they believed him to be guilty of fraudulent practices, was required by the Court to take an issue of malice. In such a case the question is not whether their impressions are well founded in point of fact, but whether they had sufficient probable cause for the *bona fide* belief which they expressed (b). The like privilege is possessed by creditors in discussing the right of a debtor to the benefit of *cessio* (c).

Confidential Inquiries.—But privilege giving rise to the necessity of averring malice is not confined to persons acting in certain specific characters, or in the discharge of particular duties. “It may, and often does arise,” says Lord Deas, “out of the mere circumstances under which individuals have occasion to communicate with each other” (d); and if this were not so, the intercourse of society would be subjected to intolerable restraint, and the business of life could not proceed. In point of fact, these inquiries are constantly made without any practical inconvenience, because the confidence shown is usually respected. A banker is consulted

(a) *Rankine v. Roberts*, 1 R. 225.

(c) *Stein v. Marshall*, M. 12443.

(b) *Torrance v. Leaf*, 13 S. 72,
and 1146.

(d) Per Lord Deas in *Kennedy v. Baillie*, 18 D. 138, 155.

about the credit of a customer; a person removing to a new district of country may lawfully ask a neighbour about the tradesmen to be employed, or the doctor to be called in. Every prudent man, with a house or farm to let, takes care to get all the information he can regarding the character of an applicant for it, and it is a duty incumbent upon people, as a matter of ordinary obligation, to state what they know in answer to such confidential inquiries.

A communication may also be justified by the intimate relation between the parties, as for instance, partners in business, solicitor and client, guardian and ward, and members of the same family. Thus letters passing between relations as to an intended marriage in the family are privileged. A widow being about to marry the pursuer, the defender, who had married her daughter, wrote a letter remonstrating, and containing imputations on the character of the intended husband, and if they had been strangers, the letter would certainly have been actionable; but it was observed that it was for the good of all that communications of this kind should be viewed liberally by juries, and there could be no such thing as confidential communications between man and man on any other terms (*a*).

(*a*) *Todd v. Hawkins*, 2 M. and Rob. 20. In *Lockhart v. Cumming*, 14 D. 452, it was held that a minister of a parish, who had heard of rumours *injuriously* affecting the character of his assistant, was not at liberty to put them in a letter addressed to a confidential friend, to enable him to inquire into their truth, as this was thought to be giving needless currency to the scandal.

Henderson v. Henderson, 17 D. 348, arose out of protest lodged with the session-clerk, after banns had been proclaimed, against a certificate of proclamation being issued. The objector was a brother of the bridegroom, and the objection was that he was marrying one of his

work-people, he being of an infirm and facile disposition, and not in a fit condition to enter into a marriage. In consequence of this protest, the clergyman refused to deliver up the certificate; but the marriage was celebrated after the banns had been proclaimed of new. In an action of damages at the instance of the married pair, the defender pleaded that, having acted *bona fide*, his case was privileged; but the Court, considering that his interference was gratuitous, and altogether foreign to the purposes of the proclamation of banns, refused effect to the plea, and granted an issue as to whether the terms of the protest were false and calumnious.

It is the privilege of a person placed in the position of governor, rector, or head-master of an educational institution, to communicate with the managers and directors of the institution in relation to its management (a). Such communications, when made *bona fide* and within the scope of his proper functions, are certainly privileged, and if malice be not shown, statements otherwise objectionable will not support a claim of damages. So the principal of a university has been held entitled to remonstrate against a contemplated appointment, by calling in question the applicant's qualifications (b).

Character of Servant.—When a servant leaves his situation the master is not bound to give him a character; but if, in answer to inquiries concerning him, he writes with the intention of communicating such facts as the other, in his opinion, ought to know, the communication comes within the scope of privileged communications; and if it contains slanderous matter, it is left to the jury to say, not whether it is true, but whether the master acted *bona fide*, intending honestly to discharge a duty, or whether he acted maliciously, intending to do an injury to the servant (c).

Should it be a very bad one, the master is not bound to substantiate every word of it; for it may often happen that the facts on which it proceeds are known only to himself. He is only bound to show his *bona fides*; but when he has officiously offered the character without its being formally asked, stronger evidence of *bona fides* will be required than otherwise might be sufficient. If the statement turns out to be false, he must show that he had reason to believe it to be true; that he did not speak in a reckless and inconsiderate manner, by assuming a knowledge which in reality he did not possess; and that it was not expressed recklessly in the presence of others (d).

(a) *Milne v. Bauchope*, 5 M. 1114.

(b) *Auld v. Shairp*, *sup.*

(c) *Wood's Master and Servant*, 309.

(d) *Christian v. Lord Kennedy*, 1 Mur. 419; *Anderson v. Wishart*, 1 Mur. 429; *Holehouse v. Walker*, 5 Mur. 1862.

Proof of Malice in Privileged Cases.—This proof may be supplied by evidence (1) of needless publicity. The communication must be made to those only to whom it would naturally fall to be addressed. A trading firm has occasion to send a certain intimation to their customers, capable of being read in a defamatory sense by those not acquainted with the matters to which it relates. Evidently it would be going beyond the purpose of the publication to send it to strangers with whom they had no business dealings; to placard it on the walls of the town, or advertise it in the newspapers; and such facts might be evidence of a malicious intention (*a*).

(2) The circumstances might show that the circular was issued in petulance or anger, and that the authors, indifferent whether harm followed or not,—or with the view of attaining some other and indirect object,—availed themselves of the occasion as a mere excuse for the publication; in such a case the evidence would be relevant for the consideration of a jury on the question of malice, for it would warrant the inference that they *intended* the circular to produce the consequences which it did produce, and to the existence of privilege, *bona fides* is essential (*b*).

(3) The language of a libel, under other circumstances justifiable, may be too strong for the occasion, and so utterly beyond and disproportionate to the facts, as to form evidence of malice sufficient to entitle the pursuer to a verdict notwithstanding the privilege. Any such inference, however, from the terms of the document itself, requires to be carefully drawn, and with due regard to the fact that the presumptions are all in favour of the defender's innocence. To hold all excess beyond the absolute exigency of the occasion, as conclusive proof of malice, might greatly limit, and perhaps defeat, the protection; and therefore it has been said that the language of a privileged communication is not to be subjected to a strict scrutiny (*c*). "If the defender honestly believed

(*a*) Per Lord Chan. (Selborne)
in *Capital & Counties Bank v. Henty*,
sup. 747.

(*b*) *Ibid.*, *sup.* 750.

(*c*) *Laughton v. Bishop of Sodor
and Man*, L. R. 4 P. C. 495, 508.

that anything which he said was true and proper for his own vindication, although in fact some of the expressions exceeded what was necessary for it" (a), the proof is insufficient; for while it is not necessary to make the evidence relevant that it should lead to malice as the necessary inference, or even be inconsistent with its non-existence, it must at least raise a probability of malice, and be more consistent with its existence than non-existence. Where the libel consisted in the application, on a privileged occasion, of the terms "disgraceful and dishonest" to the plaintiff's conduct, and he admitted that he had acted in a manner which might be so described, although it was capable also of a different construction, the Court said that the question for decision was not whether the defender did act dishonestly and disgracefully, but whether the defender, in using these words, stated no more than what he honestly believed or might reasonably believe; if so, he was not liable (b).

(4) If the assertion made proves to be false, the question of malice may turn on the state of the author's belief of its truth or untruth. If he knew it to be false, he must have acted from some wrong motive in giving it circulation, and for that no one has any privilege. If, in an ebullition of temper, he stated as true that which he did *not* know to be *true*, the jury may infer that he was too ready to gratify his anger, and so malicious. But if he honestly believed the statement which he made, it is no answer to the plea of privilege that he had no reasonable grounds for his belief. The jury, as men of the world, may think that, on the facts before the defender, they would have come to a different conclusion from that which he adopted. But a want of reasoning power is not malice. "A man may be wanting in reasoning power, or he may be very stupid, still he may be acting *bona fide*, honestly intending to discharge a duty. The question is not whether the defendant has done that

(a) *Laughton v. Bishop of Sodor* B. 590; *Spill v. Maule*, L. R. 4 Ex. 232.
and *Man*, per Sir R. Collier.

(b) *Somerville v. Hawkins*, 10 C.

which other men, as men of the world, would not have done, or whether the defendant acted in the belief that the statements he made were true, but whether he acted as he did from a desire to discharge his duty" (a). If he did not, it is for the pursuer to prove it by showing that he was actuated by some other motive.

(5) Lastly, evidence may be given of expressions of ill-will,—actual malice, as it is called,—but this is the kind of evidence which juries are most apt to misunderstand, for a malicious man may not have exceeded the privilege which the law gives him. Words not defamatory on one occasion in the mouth of an upright man, do not become defamatory in the mouth of a malicious man on an exactly similar occasion. Evidence there may be, perhaps more than enough, of pride, anger, ill-temper, or unreasonableness, and yet, the privilege being conceded, there may be nothing to prove an intention to go beyond its proper limits for the purpose of injuring the complainers. The question is for the jury (b).

Justification.—In a case which occurred soon after the institution of the Jury Court, the Lord Chief Commissioner laid down the rule on this point, which has since been rigidly followed: "The questions whether slanderous and whether true are quite different. You may show by argument that it is not slanderous, or you may prove in diminution of damages that the matter was generally reported; but if you mean to prove the truth of the particular facts, you must state them, with time, place, and person, so as to put the pursuer on his guard what you mean to bring against him" (c).

The truth is an answer to the action, not because it negatives the charge of malice,—for a statement is often not

(a) Per Cotton, L. J., in *Clark v. Molyneux*, L. R. 3 Q. B. D. 237, 249. (c) *Scott v. M'Gavin*, 2 Mur. 484; *Ogilvy v. Scott*, 14 S. 729, 1080;

(b) Per Lord Chan. (Selborne) *M'Neill v. Rorison*, 10 D. 15; *Paul in Capital & Counties Bank v. Henty, v. Jackson*, 11 R. 460. *sup.* 749.

the less malicious because it is true,—but because the pursuer is claiming damages for the loss of a character which either he did not, or ought not, to possess (*a*). Therefore the revival of an old and forgotten story, or some incident in the pursuer's early career, may be actionable,—although its truth cannot be disputed,—if there was nothing to justify the publication (*b*).

When, however, the defence is that the libel is true, the defender must show *how* it is so, with particulars sufficient to enable the Court to judge of its relevancy as an answer to the action; and if it is found relevant, the issue must be precise and pointed in the facts which the defender thereby undertakes to prove—giving dates, persons, and places (*c*). Thus, if a law-agent complains of its being said that he carried on cases for the purpose of robbing poor people, etc., it will not do to take a counter issue, asking generally “whether the pursuer, in his capacity of law-agent, carried on lawsuits for the sole purpose of creating emolument to himself, and in wanton disregard of the interests of his clients, and of the loss and ruin which might thereby be entailed on them?” The issue must inquire whether, in certain specified causes, *A. v. B.*, *C. v. D.*, carried on in a certain Court, the pursuer, in his capacity of law-agent for one of the parties, instigated and carried on said processes for the purpose of creating emolument to himself, etc. (*d*).

The counter issue must, in fact, be so framed as to enable the jury to affirm that the libel is substantially true in respect of certain things done or said by the pursuer on a particular occasion or series of occasions (*e*). If the evidence which he means to adduce merely amounts to a palliation of his conduct, without being a complete justification, then no counter issue is needed. He is entitled to prove that he did not invent the slander, but found it already in circulation; or that the

(*a*) Per Littledale, J., in *M'Pherson v. Daniels*, 10 B. & C. 263, 272, appd. by Lord Blackburn in *Watkin v. Hall*, L. R. 3 Q. B. 396, 400.

(*b*) *Fletcher v. Wilson*, 12 R. 683.

(*c*) Adam's Jury Trial, 102.

(*d*) *M'Rostie v. Ironside*, 12 D. 74.

(*e*) *Ogilvy v. Paul*, 11 M. 776.

defender had acted in such a way as to lead to the slander, although not to justify it. But whatever weight such facts may have with the jury in fixing the damages, they manifestly afford no answer to the action. If the defender heard the story from a third person, that does not negative malice—for it may have been said on a privileged occasion—and a man may maliciously repeat what another may have uttered *bona fide*; and as great—perhaps a greater—injury may accrue from the wrongful repetition as from the original circulation of the falsehood. A party is therefore not the less entitled to recover damages in a Court of law for injurious matter concerning him, because another person previously published it. The only defence is, either he was privileged to make the statement, or it was true; and so strictly is this rule enforced, that mitigating circumstances will not be allowed to be proved, when no counter issue has been taken, and they cannot be distinguished from *veritas* (a). But generally the *res gestæ* may be proved in order to enable the jury to say whether the pursuer comes before them with clean hands (b).

Where the libel consists of a general aspersion, it is enough to give particular instances justifying the inference, or at least affording reasonable and sufficient ground for it (c); still it must substantially meet the charge. If the libel is indivisible, it must cover the whole of it; if it is severable, the defender may justify some of the charges, and plead generally as to the others. A general aspersion of character is always more difficult to justify than a libel averring certain particular acts of misconduct. For example, it has been held that the fact of a man's having been convicted of a breach of certificate under the Public Houses Acts, does not necessarily infer "his being one of the worst characters ever known, deserving to be kicked out of the town" (d). To justify a statement that one was

(a) *Watkin v. Hall*, *sup.*; *Paul v. Jackson*, *sup.* But see *Torrance v. Waddell*, 7 M. 243.

(b) *White v. Clough*, 10 D. 332. (c) *M'Donald v. Begg*, 24 D. 685.
(d) *M'Donald v. Begg*, *sup.*

fit to be a member of the society of Botany Bay, it is not enough to offer to prove that pursuer was once suspected of committing a forgery; the issue must be, whether he did commit it (*a*). If the charge is adultery, it is no answer to allege acts of levity and indiscretion; because, although the fact of a woman being seen in suspicious places might tempt her neighbours to comment on her conduct, they have themselves to blame for yielding to the temptation (*b*).

Where the slander was, that the pursuer had accomplished his marriage by the false representation that he was a shareholder in the London Docks to the extent of £6000, and had bribed a person with two guineas to swear that such was the fact, the Court refused a counter issue to the effect that he had falsely represented himself to be possessed of property which he did not possess, and concocted a fictitious deed to give colour to the representation, for the purpose of accomplishing his marriage (*c*).

But a statement that pursuer had been acting in a reckless, blackguard-like way, for which twelve months' imprisonment would be too easy a punishment, was sufficiently met by a counter issue as to whether he had fraudulently obtained possession of a hogshead of whisky belonging to the defenders, and transferred it to another party, from whom he received £10 on account thereof, without communicating with his employers on the subject (*d*).

A charge of extortion against a Roman Catholic priest was allowed to be met by certain specific instances, in which he refused church ordinances to poor people until they should pay up their contributions (*e*).

Where a temperance hotel keeper was charged with allowing drinking and gambling in his house, whereby young men had been ruined, he contended that the libel could only be justified by proving not only the gambling, but the actual ruin

(*a*) *M'Donald v. M'Donald*, 2 June 1813, F. C.

(*b*) *M'Kennal v. Wilson*, Hume, 628.

(*c*) *Burnaby v. Robertson*, 10 D. 855.

(*d*) *Taylor v. Anderson*, 6 D. 1026.

(*e*) *Scott v. M'Garin*, 2 Mur. 484.

of the gamblers; but the Court held that the material part of the slander would be justified by proving that gambling was allowed, "which tended to the ruin of some young men" (a).

In a case in which the defender was charged with having said of pursuer, on 16th July 1857, that he was a "poacher and blackguard," the former proposed a counter issue as to whether the pursuer had been poaching on various occasions between the autumn of 1851 and December 1856. But the Court disallowed the issue, because the fact of having once been a poacher ought not to expose a man for ever after to be called a blackguard at the pleasure of any party (b).

A defender averring adultery in justification of slander, ought to name the person with whom the adultery is alleged to have been committed, if known, or if the person is not known, ought to say so (c), and also the time and place where the intercourse is said to have been had.

The existence of a slanderous report, or its prevalent currency, is no reason for repeating it. Each repetition is, in fact, a new injury to the party slandered, and therefore an action lies against every person by whom it is disseminated, as well as against the original author (d). But, as already observed, although public report is no answer to the action, it may be founded on in mitigation of damages (e).

(a) *Carmichael v. Cowan*, 1 M. 204.

(b) *Brownlie v. Thomson*, 21 D. 480.

(c) *Rankin v. Simpson*, 21 D. 1057.

(d) *Marshall v. Renwick*, 13 S. 1127.

(e) *M'Culloch v. Litt*, 13 D. 960; *Rose v. Robertson*, Hume, 614; *Gardner v. Marshall*, Hume, 620; *Contra Brodie v. Blair*, 12 S. 941.

CHAPTER XI.

ABUSE OF LEGAL PROCESS.

Civil Proceedings.

Litigation.—Every person who has, or fancies that he has, a good cause of action is entitled to have the question tried in a court of law, and an award of costs as taxed between party and party is the only penalty of failure. These are rarely sufficient to indemnify his antagonist, who, moreover, may have suffered grievously from important operations being needlessly delayed by foolish or frivolous controversy, respecting a matter which is finally placed beyond doubt. But it is for the public interest that access to the courts of justice should be free to all the lieges; and short of a fraudulent abuse of the privilege of a litigant, no one is liable in damages for bringing an action into Court, or opposing an application already before the Court, however absurd the claim and however ill-founded the opposition. A debtor complained that his creditor had received payment of a debt, and notwithstanding had summoned him to court and taken decree in absence, and charged him on the decree. As the pursuer was unable to furnish any adequate explanation of how, with the receipt in his pocket, he failed to prevent the decree going out against him, the Court found no damages due, nothing but negligence being alleged (*a*). But when the debtor settles an action already in Court, it is the creditor's duty to withdraw it; and if, forgetting to inform his agent that he had been paid the debt and costs, he suffers him to move for decree, which is granted and published, the creditor is answerable on an issue

(*a*) *Ormiston v. Redpath, Brown, & Co.*, 4 M. 488.

as to the proceedings having been taken maliciously and without probable cause (*a*).

Graver damage is sometimes done by ill-natured resistance than by foolish litigation, especially in Dean of Guild cases, where important operations may be stopped during the discussion of the questions raised. In a case of this sort which went to the House of Lords, the petitioner having finally obtained his warrant, brought an action of damages against his adversary for the time lost; but the Court found no grounds on which they could give redress; and it is obvious that one who conceives it to be his duty to resist a change in the *status quo*, is not to be interrogated as to his motives, and beyond being found liable in the costs caused by ill-founded opposition, is not responsible for the consequences of the delay which the discussion of the question may occasion (*b*).

Interim execution on a decree under appeal to the House of Lords is regulated by the Court with a just regard to the interests of parties as they may be affected by the affirmance or reversal of the judgment appealed from. The effect of this is to relieve the party who puts in force a decree afterwards annulled, from all responsibility. In one curious case, originating out of a quarrel between the Writers to the Signet and one of their number as to his signing summonses contrary to the rules of the body, he was put under interdict, and remained under interdict for nearly two years, until the judgment was reversed by the House of Lords; but he had no redress (*c*).

When, however, the process of a court of justice is used for the attainment of some indirect and collateral purpose, foreign to the avowed object of the suit, a litigant is guilty of an abuse of his right, and will be answerable in damages. An example of this occurred in the case of *Somerville v.*

(*a*) *Davies v. Brown & Lyell*, 5 M. 842. Publication of the decret in the Black List forms no part of the claim against the defender, not being his act. Per Lord President (Inglis) 846.

(*b*) *Gordon v. Royal Bank*, 5 S. 164; *Walker v. Gemmill*, 8 D. 838 (opposition to decree of mails and duties).

(*c*) *Graham v. Dundas*, 7 S. 876.

Thomson (a). The husband of a lady who was entitled to succeed to an estate on the death of her brother, a lieutenant in the navy, had entered into a contract of marriage under which she bound herself to confer the liferent on her husband when she so succeeded. Word having come home that the brother had died on the West Coast of Africa, the husband proceeded to serve his wife heir, to enable her to confer upon him the liferent. But the next heir, in conjunction with the factor, opposed the application on the ground that there was no certain intelligence of the death of the deceased, and managed to obstruct the service until the lady died and the estate passed to the next heir unburdened with the liferent. The Court of Session found on these facts that damages were due, because the object was apparent to defeat the liferent, and the opposition was not justified by the state of information which the parties possessed. But this judgment was reversed by the House of Lords on the ground that the proof of *mala fides* was incomplete, and the opposition to the service must therefore be presumed to have been honest (*b*). A later case, where the cause of action was ill-founded and malicious opposition to probate of a will in the Ecclesiastical Court of York, also failed. "There is," said Lord Moncreiff, "so strong a presumption for *bona fides* in a judicial proceeding taken on what I should have thought very probable grounds, that I am not able to think that any relevant cause of action can be found in the simple facts set forth in the summons against that presumption; and I cannot think that the mere use of the word fraudulently is sufficient to remove or overcome that presumption."

The principle deducible from these cases is, that no man is liable for bringing an action, or using any legal right or remedy which the law gives him without qualification, such as using arrestment or inhibition on the dependence after the action is brought, save on proof that he acted maliciously and without probable cause. "It would be most unreasonable and

(a) 19 May 1815, F. C.

Moncreiff's remarks in *Cleland v.*

(b) 6 Pat. App. 393. See Lord *Laurie*, 10 D. 1372, 1376.

inconsistent to give the pursuer of an action the right to use inhibition and arrestment on the dependence, and at the same time to make him answerable in damages, merely because he fails in obtaining a judgment against the defender, though he used his legal right moderately and in good faith; I think it would be quite as reasonable to make him answerable in damages arising from his having raised an action in which he has not succeeded" (a). Between a judicial proceeding and diligence there is, however, a wide distinction. After the decree is obtained the creditor proceeds at his own risk, and is liable for any inaccuracy in the execution of the diligence.

Petitions for Sequestration.—Some actions, which in their initial stage are proper judicial proceedings, soon assume the character of a diligence. A summons of adjudication, for instance, is an action; but after decree the process becomes a diligence. So a petition for sequestration is an action, although after the prayer of the petition is granted it has all the force of a diligence of a very sweeping description. It follows that a creditor availing himself of this remedy against a debtor who is a notour bankrupt has the privilege of a litigant; and if the alleged bankrupt enters appearance and ultimately succeeds in getting the sequestration refused or recalled (if already granted) on some technical ground, there is no case for damages. This assumes, however, that the proceedings are regularly taken, that the debt is not fictitious, and the proof of notour bankruptcy such as was required by the statute. If this proof fail, *e.g.* from the debt having been charged on, on an *inducie* of six instead of fifteen days, there is no notour bankruptcy; the application for cessio or sequestration will be inept, and the creditor will be answerable at whose instance the proceedings were "wrongfully" taken (b).

An application presented maliciously and without probable cause for the sequestration of a trader's estates must necessarily be to his injury, for it is ruinous to his credit; and to support

(a) Per Lord President (Inglis) in *Kinnes v. Adam*, 9 R. 698, 702. (b) *Smith & Co. v. Taylor*, 10 R. 291.

the action, averment of special damage is unnecessary. In fact, this is now a recognised form of attack on a public company when the object is to run down the shares, or force the directors to buy them at a higher price than is going in the market. A petition for winding-up is presented; it has to be advertised in the newspapers, and the existence of the company is imperilled. No such application can therefore be made, except on the footing that if presented maliciously and without reasonable and probable cause, the company which is unjustly assailed will be fully indemnified (*a*).

Reasonable and Probable Cause.—In a civil action what is meant by the expression “without reasonable and probable cause”? An unfounded application may be unfounded in fact or unfounded in law. If an application fails in fact, the question of *bona fides* will depend on many considerations, particularly on how far the party made such full inquiry before coming into Court as to make his ignorance of the true facts excusable. But when there is no mistake in fact, and the application fails in law, it by no means follows that he has gone so wilfully astray as to render his error malicious. The matter was matter of opinion; and it is not easy to see how an action of damages will ever lie for a mere mistake in opinion on a question of law, especially when it appears that the facts have been quite accurately presented to the Court, and the judge of the first instance sided with the petitioner. The decision may not be conclusive; but it entitles the Court and jury to infer that what the judge held to be law the petitioner *bona fide* believed to be law. If, of course, the petitioner had no such belief, then the malice, combined with the groundlessness of his application, is sufficient to support the action (*b*).

Applications ex Parte.—A distinction is taken between arrestments and inhibition (remedies to which a litigant is

(*a*) *Quartz Hill Gold Mining Co.*, L. R. 11 Q. B. D. 674. (*b*) *Johnson v. Emerson*, L. R. 6 Ex. 329.

entitled to resort at his own hand), and interdict which is only granted on the presentation of a *prima facie* case,—possibly after hearing both sides, but always *causa cognita*. Both arrestment and inhibition may be used on the dependence, and in an action for the wrongful use of arrestments the pursuer must take an issue of malice and want of probable cause (a). In interdicts, however, the issue is simply “wrongful,” because while the right to use arrestment or inhibition is as unqualified as the right to serve a summons, an application for interdict is made *periculo petentis*, and is granted on the condition that the party and his cautioner shall be answerable in the event of the interdict being found to be illegal (b). At the same time, there are many questions which can only be conveniently tried under a petition for an interdict, which then means little more than an appeal to the judge to regulate the possession until the dispute between the parties is determined; and in these cases the principle stated is subject to modification (c).

(1.) Where the person seeking the interdict has been in undisturbed possession, and the other party is seeking to dispossess him, it is the natural and proper course to grant interim interdict until the question is settled. It operates like a possessory judgment continuing the possession which had been lawfully held for a series of years until the party offering a better title has proved it, or the question has been otherwise decided. Thus, where a party having a clear right of ferry, which he thought entitled him to the exclusive right of carrying passengers to the steamers calling off the ferry (a contention in which he was afterwards found to be wrong), obtained interdict against a neighbouring proprietor, prohibiting

(a) *Wolthecker v. North Agri. Co.*, 1 M. 211; *Brodie v. Young*, 13 D. 737; *Henning v. Hewatson*, 14 D. 1084; *Baillie v. Hume*, 16 D. 161; *Meikle v. Sneddon*, 24 D. 720; *Petersen v. M'Lean & Hope*, 6 M. 218.
 (b) Per Ld. Fullerton in *Buchanan v. Douglas*, 15 D. 365, 370.
 (c) *Gilmour & Anderson v. Gilchrist*, 29 Jur. 411; *Abel's Exrs. v. Edmond*, 1 M. 1061; *Robinson v. N. B. Ry. Co.*, 2 M. 841; *Miller v. Hunter*, 3 M. 740; *Kennedy v. Police Comrs. of Fort William*, 5 R. 302.

him from carrying passengers from his own ground in boats of his own, within the ferry limits to the steamers, the Court held that no damages were due, because the application had been made *bona fide*; and although the interdict had been kept up for nearly two years, the object was not to invert but to continue the existing state of possession (*a*). Nor is a claim maintainable for being prevented by interdict from proceeding with a building, which it was ultimately decided the party had no right to erect, although the interdict was recalled as not being the proper remedy in the circumstances (*b*).

(2.) Where, however, the effect is to interrupt operations *in suo*, the party availing himself of this remedy appears to proceed at his own risk. A railway company were interdicted from erecting a tunnel in the petitioner's property. There was no dispute as to the company's right under their Act of Parliament to drive the tunnel, and that the subsoil removed was of no present value; but the parties had disputed about the amount of compensation, and the company was interdicted on the ground that before taking possession they were bound to pay the price of the ground and of the tenements on either side. The dispute being wholly pecuniary, the remedy of interdict was in the circumstances held by the Court to be entirely unnecessary, and as it had resulted in the stoppage of extensive works, they must be found liable in damages (*c*). So, where a landlord interdicted his tenant from taking a way-going crop from 100 acres, and so, while depriving him of a benefit to which by his lease he was entitled, enlarged to a corresponding extent the fallow belonging to the landlord, it was held that the landlord must compensate the tenant for the loss he had sustained (*d*). In this case it was not disputed that interdict was applied for in good faith and on probable grounds, and on a statement of facts which was not impugned as incorrect. The landlord adopted a construction of the lease for which much was to be said, and his only error

(a) *Moir v. Hunter*, 11 S. 32.

Glasgow Coal Exchange Co., 12 R. 1287.

(b) *Jack v. Begg*, 3 R. 35.

(c) *Glasgow City & Dist. Ry. Co. v.*

(d) *Miller v. Hunter*, 3 M. 740.

was one of law. But, on the other hand, it was a case in which interdict was an altogether unsuitable method of regulating the possession *ad interim*. He must have known that the loss would be wholly irremediable if he was found to be wrong and the tenant right, and he was properly held to have taken the risk.

In the case of *Kennedy v. The Police Commissioners of Fort William* (a), the Police Commissioners acting under their Police Act had a dispute with one of the proprietors within the burgh as to his right, contrary to the orders of the Commissioners, to erect a new building not in line with the other houses forming the street. The question between the parties turned entirely upon the construction of section 162 of the Police Act of 1862. There was no dispute about the facts. The statute gave the party the right of appeal to the sheriff against an incompetent order of the Commissioners, and they, acting for the public interest, applied for interdict till the legal question was determined. The sheriff-substitute granted interdict, which the sheriff recalled, and his judgment on appeal to the Court of Session and the House of Lords was sustained. In a subsequent action of damages, the Court held that as the Commissioners had misread the statute the rate-payers must answer for it, and the issue granted was whether the Commissioners had wrongfully prevented the pursuer from proceeding with building operations then in course of being erected on his premises.

Meditatione Fugæ Warrants.—Although imprisonment for civil debt is now abolished, it is still competent for a creditor to cause his debtor to be apprehended as *in meditatione fugæ*, and kept in custody until he finds security to appear in any action which may be raised against him within a certain time, usually six months. It is, however, no longer competent, as it formerly was, to exact security to abide the course of diligence on a judgment already obtained (b), unless probably

(a) 4 R. 262; 4 R. (H. L.) 215; *Kidd v. Hyde*, 9 R. 803. See 5 R. 302.

Dove Wilson's Sheriff Court Pr.

(b) 43 & 44 Vict. c. 34, § 4; 462.

the debt decreed for is one of the limited class for which imprisonment may still be resorted to.

This warrant has always been regarded as an extraordinary remedy,—unknown before the middle of the seventeenth century,—and proceeding on the assumption that the debtor, in the knowledge that an action was either raised or about to be raised against him which he could not defend, was seeking by flight to defeat the course of justice by leaving his creditors in the lurch. That it is his intention to leave the country for other than a temporary purpose must be made manifest, and the effect of the warrant is to authorize the debtor's committal to jail till he find bail *de judicio sisti*. Caution *de judicatum solvi* was never exacted, because as the cautioner was bound to produce the debtor personally at all “diets of Court” during the trial, the creditor had always the means of obtaining a fresh warrant of apprehension after decree.

In accordance with the theory on which it is founded, the debt need not be actually exigible; a random claim of damages, or a claim by a pregnant woman against the putative father of a child which may never be born, is enough to justify the application (a).

The application being quite out of the usual course, and wholly for the creditor's benefit, is held to be taken by the creditor at his own risk; and as it is a direct invasion of the debtor's liberty, he must act with perfect good faith. Nay, it has been held that actual *bona fides* will not always protect the creditor (b). The belief in the supposed intention of the debtor must be rested on reasonable grounds and not on fanciful conjectures; and if it appear that it has originated in a mistake or misapprehension, he will be liable in damages unless his suspicions were a just inference from the debtor's own conduct. It follows that the debtor is not entitled to the high privileges which belong to judicial proceedings of an ordinary kind (c). The question put to the jury is—whether

(a) *Davies v. Duncan*, 23 D. 532; *Swayne v. Fife Banking Co.*, 13 S. M'Gill v. Ferner, 16 S. 934. 1003; *M'Lean v. Colthart*, 3 M. 719.

(b) *Ford v. Muirhead*, 20 D. 949; (c) *Ford v. Muirhead*, *sup.*

under the warrant obtained against him as *in meditatione fugæ* he was wrongfully apprehended, etc., meaning thereby improperly and on inadequate grounds.

If the warrant has been granted by a magistrate, it is not necessary that it should be brought under review or set aside by reduction in order to open the way to an action of damages. The action of the sheriff may have been quite proper with the documents which were before him, and in the hurried way in which he was obliged to conduct the inquiry; but if, on further proof, the debtor can show that the entire proceeding was groundless, or taken in bad faith, the claim will be sustained. It has been said that the magistrate will be liable to the creditor for refusing his application without just cause, as well as to the debtor for granting it rashly on insufficient grounds, or for gross errors in the subsequent proceedings; but no recent instance of this has occurred, and it is doubtful whether the earlier cases to this effect are reconcilable with the views which now prevail respecting the protection due to the judicial office (a).

Diligence.—The fourth section of the Debtors (Scotland) Act, 1880, enacts that no person shall, after the commencement of the Act, be apprehended or imprisoned on account of civil debts not being—(1) Taxes, fines, or penalties due to Her Majesty, and rates or assessments lawfully imposed or to be imposed; (2) sums decerned for aliment. These two classes of debts are excepted, because they so directly affect the public interest. The first are preferential to all other debts, and always must be paid (b); as regards the second, the object is to compel putative fathers to support their bastard children, which otherwise may become a burden on the rates. This Act was followed by the Statute 45 & 46 Vict. cap. 42, which further restricts the power of imprisonment for failure to

(a) *In Carne v. Manuel*, 13 D. 1253, the action was directed against the creditor who had obtained the warrant, the magistrate who had granted it, and the writer who had acted as the creditor's agent.
(b) *N. B. Property Inv. Co. v. Paterson*, 15 R. 885.

pay alimentary debts or public rates. The period is restricted to six weeks; but every six months the debtor in an affiliation case may be imprisoned a second time under the same decree for the same or additional sums as they become due (*a*). On the other hand, the Act does not entitle a parochial board to enforce its relief against a relative for the expense incurred in maintaining a pauper, the board's right of relief not being aliment in the sense of the Act (*b*). The Act also does not make imprisonment unlawful on decrees *ad facta præstanda*. Hitherto the same facts on which a decree for damages could be had, have been held to warrant a decree for specific implement; and, as imprisonment was competent on both, the question of the creditor's right to either alternative had no practical importance. Now, however, that the remedy for enforcing the decree differs, it may be assumed that the pursuer will not be entitled to have his choice as a matter of course; and in most cases damages will be a sufficient remedy (*c*).

By our ancient law the goods on the land could be seized *brevi manu*, without any judicial authority, by a landlord in payment of his rent, and a heritable creditor in payment of his debt; and the process called Poining of the Ground is a survival of this practice,—the effect being that all the moveables on the ground in which the creditor is infeft under his bond (whether his debtor's own property or the property of the debtor's debtor), are impounded as an accessory of his security. It requires to be neither preceded by a charge nor followed by an inventory; and the proceeding, in fact, is not a poining at all, but judicial notice to the debtor operating from the service of the summons that his moveables are to be detained to meet the creditor's demand (*d*). Personal poining, on the other hand, is the diligence by which a debtor's goods

(*a*) *Walker v. Bryce*, 9 R. 249. (H. L.) 91; *Winans v. Mackenzie*,

(*b*) 45 & 46 Vict. c. 42, § 4; 20 S. L. R. 640.

Tevendale v. Duncan, 10 R. 852. (*d*) *Campbell's Trs. v. Paul*, 13

(*c*) *Moore v. Paterson*, 9 R. 337; S. 237; *Barstow v. Mowbray*, 18 D. *Grahame v. Mags. of Kirkaldy*, 9 R. 846; *Lyons v. Anderson*, 8 R. 24.

are seized in execution for payment of a debt by an officer of the law appointed for the purpose of executing legal writs.

Although in one sense these officers of the law are public functionaries, and the creditor is not at liberty either to execute the diligence himself, or to employ any one not belonging to the class appointed by the Court for the purpose, the officer differs from public executive officers in that he never acts except in the interest of a private party, and then only by request and for a fixed reward. The relation between them is therefore that of principal and agent. Not only is the employer answerable for what the officer does by his orders, but in executing the warrant which he (or his solicitor) puts into his hands for execution, for his mistakes, blunders, and negligence, such as arresting the body, or taking the goods of the wrong person, pouncing without giving a previous charge, and inventorying property much in excess of the value required to meet the debt (*a*). As some protection to the employer against this great responsibility, an officer is not admitted except on condition of finding a cautioner, who shall be subsidiarily liable to make good the damage which may be caused by him in the performance of his duties. The claim against the cautioner may arise at the instance (1) of the debtor against whom the proceedings were directed; (2) of the creditor on whose employment he acted, either for the loss he has directly suffered through the miscarriage of the diligence, or by way of relief (*b*) of the damages in which he has been found liable to others.

Messenger — Duties to the Employer. — (1) A messenger in undertaking his office becomes, as it were, “by special contract” bound to execute his office against whomsoever he may be employed to do so (*c*). He has no discretion in the matter. If, when ordered to execute a diligence

(*a*) *Macdonell v. Bank of Scotland*, 13 S. 701; *Beattie v. M'Lellan*, 8 D. 930; *Le Conte v. Douglas*, 8 R. 175. (*b*) *Struthers v. Dykes*, 9 D. 1437. (*c*) Per Lord Gillies in *Glen v. Black*, 4 D. 36, 42.

immediately, he fails to do so, it is not for him to urge that the proceeding would have led to no result. When imprisonment for debt was competent, if it appeared that, in violation of his instructions, the officer did not take the steps necessary to incarcerate the debtor, he was found liable in the amount of the debt, although, from the escape of the debtor, the creditor was perhaps not a farthing the worse, and would never have recovered anything by his imprisonment (*a*). On the other hand, to produce this result (1) the instructions should be explicit. If they were ambiguous, or so expressed as to leave a discretion to the messenger, a more lenient view was taken of his conduct. (2) The officer's next duty was to see that the return made of the execution was correct in point of form, and sufficiently accurate as regards names, dates, and other particulars, to be a good foundation for the ulterior diligence and the steps which were in contemplation. The agent who obtained the warrant, and entrusted it to the messenger to execute, is allowed a fee for revising the execution; but if it happened to be blundered, the messenger was not allowed to throw the blame on the agent for not being more careful in its revisal. The agent might be liable to the creditor himself for breach of duty, but his failure was no excuse to the messenger for his own carelessness, and the creditor was entitled to recover from him the whole damages and expenses which his blunder might have occasioned (*b*). (3) Lastly, the officer was bound immediately to return the execution in time to admit of steps being taken for the incarceration of the debtor on the expiry of the days of charge. When this was omitted to be done, and the debtor took advantage of the opportunity to withdraw to the sanctuary, and thereby defeat the diligence, the officer was found liable in the debt (*c*).

These rules operated with great severity on the officer; but now, when execution is confined to diligence against property,

(*a*) *Clyne v. Murray*, 9 S. *Clason v. Black*, 4 D. 743; *Brock* 338. *v. Kemp*, 6 D. 709.

(*b*) *Collier v. Beath*, 15 S. 195; (*c*) *Glen v. Black*, *sup.*

it is thought that the measure of the loss is not the debt, but the value of the property which, but for the officer's mal-procedure, would have been recovered.

The foundation of the diligence is the decree. If the decree be *ex facie* regular, and issuing from a competent court, the holder of it is entitled to put it in force without rendering himself liable in damages, although it should ultimately be found to be erroneous (*a*), and even although it had passed in absence. A defender who is duly summoned, and fails to appear, is held as confessed; and the creditor is fully warranted in putting the decree to execution. But not so when the warrant is incompetent (*b*). The debtor was entitled to damages when, for instance, he was apprehended for the whole amount of a bill, when in reality he was only due one-half, or when the warrant had been executed after an agreement to grant delay (*c*), or after due tender of the debt was made. But neither the officer nor the agent is liable in damages for executing diligence for a sum larger than is due, unless they were cognisant, or ought to have been cognisant of the overcharge. The wrong here was done by the client without their knowledge, and the client must answer for himself (*d*).

Following on the decree is the charge—a requisition to pay the sums mentioned in the decree within the time specified in the warrant; and in order that it may appear when this will expire, the date of the charge is essential (*e*). Credit should also be given for what has been paid to account (*f*). Thereafter the proceedings are carried out in a summary way. The goods are appraised by the officer, and on his report, warrant is got to sell them. An exact valuation is not to be expected, but a reasonable effort should be made to

(*a*) *Aitken v. Finlay*, 15 S. 683. (*c*) *Cameron v. Mortimer*, 10 M.

(*b*) *Bell v. Gunn*, 21 D. 1008; 817.

Ormiston v. Redpath, Brown, & Co., 4 M. 488; *Graham v. Dundas*, 7 S. 104. (*d*) *Henderson v. Rollo*, 10 M.

876; *Gordon's Exrs. v. Dunlop*, 3 (*e*) *Beattie v. McLellan*, *sup.*

Mur. 515; *Imrie v. McWhannell*, 9 (*f*) *McMartin v. Forbes*, 3 S. 275.
D. 24.

indicate the correct value. Where an officer in the execution of a poinding of the ground poinded effects amounting to £72, 19s. for a debt of £13, the Court held the poinding excessive; and where, in carrying through the poinding under a small debt decree, the whole furniture in the house was seized, together with several portfolios full of engravings, and all entered at the amount of the debt; the creditor, who, with notice of the objectionable character of the officer's conduct, had adopted and ratified the proceedings, was found liable in damages (*a*). The creditor in executing diligence is bound to exercise his rights in a reasonable manner, and with due regard to the interests of his debtor. A landlord is not allowed to eject a family after nightfall (*b*), nor to apply for sequestration the very day the rent is due, and keep it up long after the amount had been consigned (*c*), nor when the sum was in dispute (*d*), nor, in fact, to use it at all when the circumstances show that it was ruinous and oppressive, not being reasonably required for his protection (*e*). In such cases as these, it is not necessary for the pursuer seeking damages to aver malice and want of probable cause; it is enough for him to prove that the proceedings were wrongful (*f*). A creditor may require to resort to harsh measures to secure payment of his debt; and although there always must be loss on a forced sale, whenever the proceedings indicate oppression and a want of due consideration for the interests of the debtor, damages are due (*g*).

If the messenger has been guilty of an entirely unauthorized proceeding, such as executing the diligence a second time after the warrant by previous execution had been exhausted, and the debt had in the meantime been consigned, the employer would not be responsible (*h*). But if the officer poinds without a previous charge, or returns the execution

(*a*) *M'Kinnon v. Hamilton*, 4 M. 852; *Le Conte v. Douglas*, 8 R. 175.

(*b*) *M'Gregor v. Strathallan*, 2 M. 1339.

(*c*) *Oswald v. Graeme*, 13 D. 1229.

(*d*) *Duffy v. Gray*, 20 D. 580.

(*e*) *Oswald, supra*.

(*f*) *Watson v. M'Culloch*, 5 R. 843.

(*g*) *Robertson v. Galbraith*, 19 D. 1016.

(*h*) *Stewart v. Macdonald*, M.

13,989.

blank in the induciæ, and with the name of one of the witnesses forged, the employer, however innocent, must answer for his acts as if they had been expressly authorized (a). A procurator-fiscal employing a messenger without any special instructions is in a different position in this respect from a private party. But the private party, whether he gives special instructions or not, is responsible for any gross error of the officer who is employed by him, which renders the execution of the charge illegal; and "I think," says Lord Moncreiff, "that it would be a very dangerous thing if the law were otherwise" (b).

Criminal Proceedings.

Malicious Prosecution.—As in Scotland the duty of investigating and prosecuting crime belongs to the State, and is entrusted to a public official, there is almost no room for claims on account of malicious prosecution. For, between a public officer like the procurator-fiscal and a private prosecutor there is an obvious difference. The former is bound to interfere, and the latter is not. The one is engaged in a public duty which is semi-judicial in its nature, and in which he is not likely to be influenced by any motive but a conscientious desire to act justly, as between the public and the prisoner. The latter is a mere volunteer, and may or may not be influenced by feelings of enmity, and a wish to effect some collateral purpose. It was therefore settled by the case of *Arbuckle v. Taylor* in 1815 (c), that if a procurator-fiscal acts within the scope of his duty, and the procedure is regular and legal, the proceedings are privileged at common law, and he cannot be held liable in damages for an error in judgment, or a mistaken view of the facts, unless malice and want of probable cause be proved.

The rule thus stated implies that no action can be main-

(a) *Macdonell v. Bank of Scotland*, 13 S. 701.

(b) *Beattie v. M'Lellan*, 8 D. 930, 940.

(c) 3 Dow 160.

tained as for malicious prosecution, unless (1) the proceeding has terminated in the acquittal of the accused; (2) has originated out of malice; (3) was without probable cause; and (4) has caused damage to the pursuer.

The form of reviewing a criminal warrant is by suspension before the High Court, acting in its capacity of Supreme Court of Appeal in all criminal matters. It is the equivalent of a reduction in the civil court, and it is no objection that the illegal sentence has been suffered and undergone before the suspension has been raised; for the object of the process is not only to obtain the release of a prisoner from unlawful imprisonment, but to quash and annul the unlawful sentence (*a*). A tribunal, however, like the High Court, which annuls a sentence because it is bad in form, or contrary to law, does not review on the merits; it can only review on the record as it stands, and deal with such objections as, that the libel is irrelevant (*b*); that evidence has been improperly admitted (*c*) or rejected (*d*); that irregularities have been committed by the assize (*e*); or that the verdict is ambiguous or incomplete (*f*). As no record is preserved of the sheriff's charge, no review can be had of the law laid down to the jury, however bad (*g*).

When damages are claimed, it is necessary that the proceedings should have been dropped, or, if insisted in, should have terminated in the acquittal of the accused; and a conviction is a complete bar to any civil action until it is quashed or set aside by a proper court of review. The reason is that the first judgment is conclusive on the question of reasonable or probable cause. Were it otherwise, every case which has been tried on its merits in the criminal court would have to be tried over again in the civil court, which would be incon-

(*a*) *Russell v. Colquhoun*, 2 Br. 572, 579. (*e*) *M'Garth v. Bathgate*, 2 Irv. 571.

(*b*) *Anderson v. Blair*, 4 Irv. 5; (*f*) *Grahame v. Todrick*, 4 Irv. 504; *Gray v. M'Kenzie*, 4 Irv. 166; *Clendinnen v. Rodger*, 3 Coup. 171.

(*c*) *Burns v. Hart*, 2 Irv. 571; *Milne v. Simpson*, 2 Coup. 562. *Hume*, 2. 515.

(*d*) *Alison*, 2. 28. (*g*) *Quarrens v. Hart*, 5 Irv. 251; *Alison*, 2. 679.

sistent with the fundamental principles on which the law is administered—that it is beyond the province of one Court not being a court of appeal to review a sentence passed by another (a). It makes no difference that the party convicted has no right of appeal, for the High Court of Justiciary will always annul a sentence which has been obtained through oppression (b). But although it is true that in all cases a suspension is necessary to open the door to a civil action, there are many grounds on which a sentence may be set aside so as to relieve the party of criminal pains and penalties without inferring liability on the part of the prosecutor. The party might have been acquitted through want of evidence, or the conviction may have been quashed on some purely technical ground; but the defender in a civil suit will be entitled to a verdict if he proves by any competent evidence, whether adduced at the former trial or not, that the pursuer was in fact guilty of what was laid to his charge, or that there were grounds for honestly thinking him to be so. To this effect the Summary Procedure Act enacts: “No procurator-fiscal or other party prosecuting for the public interest by complaint under the provisions of this or any other Act, shall be liable to pay, or be found liable by any Court in a greater sum than £5 as damages for or in respect of any proceedings taken, or anything done on such complaint, or on any judgment following on such complaint, unless the person prosecuting for damages shall aver and prove that such proceeding was taken or done maliciously and without probable cause; but the party suing such damages shall not be entitled to have any decret or verdict pronounced against such procurator-fiscal or other party prosecuting, for any damages or return or repetition of penalty or costs, in case such prosecutor shall prove at the trial that the party suing was guilty of the offence in respect whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had

(a) *Basebé v. Matthews*, L. R. 2 C. P. 684.

(b) *Williamson v. Linton*, 20 D. 808.

undergone no greater or other punishment than was assigned by law to such offence. And any such prosecutor sued as aforesaid may at any time put an end to the action, in so far as not founded on acts done maliciously and without probable cause, by tendering payment of the sum of £5 as damages, with the amount of the penalty if recovered, and the expenses of such action to the date of the tender" (a).

We have already observed that in civil proceedings a mistake in law is not want of probable cause which is essential to liability in damages. And the like has been decided with respect to a prosecution instituted by a fiscal under a misapprehension of the law. A publican, whose premises had been burned down, continued his trade within the roofless walls, under the belief that his certificate entitled him to do so; but the local authorities being of a different opinion, he was convicted by the justices, at the fiscal's instance, of selling liquors without a licence. The High Court having quashed the sentence, on the ground that the justices had mistaken the law, the Court held, in a subsequent action of damages against the procurator-fiscal, that the claim was not maintainable. It was observed that the facts being undisputed, and the view of the law which the fiscal maintained, and the justices upheld, such as reasonable men in their position might excusably entertain, there was no ground for saying that the prosecution had been instituted maliciously and without cause (b). Where, however, there is no dispute about the law, but the charge is so framed as to amount to no offence at all, the fiscal is not exempt from responsibility. A party who had passed a cheque on a branch bank, knowing well that he had no money at his credit in the bank, was informed against by the bank, prosecuted by the fiscal, and convicted by the police magistrate of fraud, on a complaint which was so expressed as to amount in the opinion of the High Court to no crime at all under the law of Scotland. In a subsequent action of damages at the instance of the accused against both

(a) 27 & 28 Vict. cap. 53, sec. 30.

(b) *Craig v. Peebles*, 3 R. 441.

the bank and the fiscal, he contended that a man who caused another to be apprehended for what was no crime at all was entitled to no protection. But the Court held that a private party laying an information before the competent authority, and a public officer in taking it up and dealing with it, were not liable without proof of motive and probable cause (a). The same course was followed where an offence of which the pursuer had been convicted under the Night Poaching Act was set aside on these grounds:—(1) That one of the charges was irrelevant, in respect it did not charge the accused with unlawfully killing game; and (2) that the accused was convicted of both charges when the charges were alternative. On the question whether malice or want of probable cause should be put in issue, Lord President M'Neill observed: "Mere failure of success on the part of the prosecution is not of itself a ground of action; but there may be failure under circumstances which make it pretty obvious that there was malice and want of probable cause in raising the action; in which case the party accused may have his action after acquittal, on the ground of malice and want of probable cause." His Lordship added that while in his opinion the irrelevancy of the charge as laid would not of itself justify an action of damages, there might be such gross irrelevancy on the face of the libel as should have deterred any man from stating the accusation, or any judge from proceeding on it. If, for example, there were no statement about killing hares at all, but only that A. B. went along the high road, it might not be necessary to libel malice and want of probable cause. But that was not the nature of this case. It was a question of relevancy which the court of review were called on to decide, turning on the grammatical construction of the sentence. The word "unlawful" was so placed that it covered only the immediate sequence and not the whole charge, and so things were averred which were held to be irrelevant. But part of the charge was held relevant. He thought that a procurator-fiscal, proceeding in regular course, was entitled to have such

(a) *Rae v. Linton and Bk. of Scot.*, 2 R. 669.

protection as to have it put upon the pursuer to prove malice and want of probable cause (*a*).

A procurator-fiscal, however, has been held entitled to no protection when he has been guilty of such palpable mistakes as causing a person to be apprehended for an offence alleged to have been committed beyond the limits of his district (*b*), or charging as a crime that which is palpably not a crime (*c*), or executing a general search warrant, which is notoriously illegal (*d*). In this last case Lord Benholme said: "When a judge grants a warrant which is *ultra vires*, and that warrant is acted on by a procurator-fiscal, the fiscal must be liable, whether malice and want of probable cause be averred or not. The presence of these elements may aggravate his liability, but are not necessary to it." And Lord Justice-Clerk Inglis laid it down, that if the judge who granted the warrant had no power to do so, the party putting such warrant into execution is liable for the consequences. "In this, a procurator-fiscal is no more privileged than any private person; and therefore to require an allegation of malice and want of probable cause is against all principle and all authority. There can be no probable cause for the execution of an illegal warrant."

The cases both in England and Scotland seem to establish that as it is impossible to reduce to any definite rule the

(*a*) *Mann v. M'Lulich*, 23 D. 1258. by Dunning arguendo for Wilkes in a nutshell. Wilkes had been seized

(*b*) *McCrone v. Sawers*, 13 S. 443. on a warrant issued by the Secretary of State, commanding the officers to

(*c*) *Milhollan v. Bertram*, 5 S. 170; *Strachan v. Stoddart*, 7 S. 4; *Richardson v. Williamson*, 10 S. 607. search for and apprehend the author, printer, and publisher of the *North Briton*. "You might as well," said Dunning, "issue a warrant to take up the murderer or the robber; it was obvious this did not warrant the agent at all; it made him the judge of the whole matter instead of the person who gave him the warrant." In these last cases the Twopenny Acts were founded on in vain. They are the 43 Geo. III. cap. 141, secs. 1 and 2; 9 Geo. IV. cap. 29, sec. 26; and 11 Geo. IV. and 1 Will. IV. cap. 37, sec. 13. See Paley on Convictions, p. 489.

(*d*) *Bell v. Black & Morrison*, 3 M. 1026; *Gibson v. Murdoch*, *ib.* 1030. The unconstitutional character of a general warrant was put *R. v. Wilkes*, 3 Burr. 1760. In all cases, civil and criminal, the *persona* is designated. See Lord Ivory in *Drew v. Lumsden*, 22 D. 3; *Jamieson v. Main*, 5 Mur. 117.

circumstances which will constitute reasonable and probable cause, the question of its existence is always a question of law,—an inference to be drawn by the judge and not by the jury. Lord Westbury, in the case of *Lister v. Perryman* (a), regretted that the law should be so, because in his opinion it should be the other way; and upon this Lord Colonsay remarked that in Scotland that view was followed, for it was here treated as an inference of fact to be deduced by the jury from the whole circumstances of the case, in like manner as a question of malice is left to the jury. This, however, is not consistent with some other expressions of judicial opinion. Lord Kinloch said (b): “What is probable cause is for the judge; and if the facts be disputed it is for the jury, under the judge’s direction, to find facts which constitute the cause.” In this Lord Ormidale in a later case (c) agreed, but remarked that it may be for the jury first to find the facts where they are disputed. The result therefore seems to be this:—If the case as averred by the pursuer himself discloses probable cause, the Court will so find and dismiss the action. If it arises on the facts set up by the defender, the judge must determine whether the facts if proved constitute probable cause, and the jury will then decide whether the facts exist.

The expression of which we have been speaking is not native to the law of Scotland. It appears for the first time in the Statute 45 Geo. III. for the protection of justices, and is borrowed from the law of England (d). It means, not the actual existence, but a *bona fide* belief in the existence of cause for the accusation; and the pursuer has to prove, 1st, that he was innocent; 2nd, that the circumstances were inconsistent with an honest belief in his guilt; there being neither reasonable cause, “such as would operate on the mind of a discreet man,” nor probable cause, “such as would

(a) L. R. 4 H. L. 521, 538.

(b) *Urquhart v. Dick*, 3 M. 932, 934.

(c) *Craig v. Peebles*, *sup.* 447.

(d) Per Lord Pitmilley in *Strachan v. Stoddart*, *sup.* 6; per Tindal, C. J., in *Broad v. Ham*, 5 Bing. N. C. 722, 725.

operate on the mind of a reasonable man"—at all events not such as would operate on the mind of the party making the charge, otherwise there is no reasonable cause for him. Practically the question is whether the party responsible for the prosecution took reasonable care to inform himself of the true facts of the case before commencing proceedings, and honestly believed the case which he put before the Court. To entitle the pursuer to a verdict, it lies on him to prove that the defender did not do so. A man may be said to take reasonable care to inform himself when he acts upon facts within his own knowledge, provided they are reasonably sufficient for inferring the prisoner's guilt. He may have seen the crime committed; or he may have heard the accused confess that he did it; or he may have found the stolen property *de recenti* in his possession; but when he acts upon facts reported to him by others, the first question for him to consider is the trustworthiness of the medium through which his information comes, and the next the sufficiency of the facts, if true, to lead to a conclusion hostile to the accused. If there be room for doubt on either point, he is not free from blame; and it may also be an important element to consider whether there was a ready and obvious method of ascertaining the actual truth, which he had thoughtlessly or recklessly neglected.

When want of probable cause has been established, the further question is—Was the defender in what he did actuated by malice; that is to say, was he actuated by some motive other than an honest desire to bring the person whom he believes to have offended against the criminal law, to justice? It is obvious that the two things are here entirely distinct. Proof of malice alone is not sufficient to entitle a jury to find for the pursuer, because the person actuated by the plainest malice, may nevertheless have a justifiable reason for the prosecution. When malice is meant to be alleged as a special quality of the act complained of, apart from the inference to be derived from the act itself there should be some distinct statement of facts, to explain the grounds from which

such malice is to be inferred. But mere proof of the strongest malice is no evidence of want of probable cause. In the words of Lord Eldon, "It has been decided over and over again, that if a man's malice is as foul and black as it can be represented, yet if he has probable cause for the complaint he cannot be liable to any action for a malicious prosecution; and, on the other hand, if it has been found that he has no probable cause for the complaint, but his mind was devoid of malice, neither can an action be maintained" (*a*). The two things must concur. But the common sense of mankind attributes malice to any one who makes a false and calumnious charge against another without reasonable excuse (*b*); and want of probable cause is always some evidence of malice. The jury are not bound to draw the inference, but they may do so, and once it is established that the prosecution was without any adequate ground, it is difficult to resist the conclusion that the defender was influenced by some improper motive.

Two cases may be mentioned in illustration of what is above laid down. A woman three months gone in pregnancy was examined by a medical man, who certified that she had been delivered of a child within the last six weeks, and thereupon she was apprehended by order of the procurator-fiscal, and charged with the murder of her child. In an action of damages against the medical man, it was strongly urged that the pursuer was not the employer of the defender, who owed no duty to her. But this was rejected by the Court, which held that a medical man employed by a procurator-fiscal on a point of medical science, owed a duty to the public, and a duty to the accused. But, on the other hand, he was not responsible for his information, whatever were the consequences, if the information was given honestly,

(*a*) *Young v. Leven* (1822), 1 Sh. App. 179, for malicious prosecution we are at liberty to read malicious accusation; *Green v. Chalmers*, 6 R. 318. also *Thomson v. Adam*, 4 M. 29; *Shepherd v. Fraser*, 11 D. 446; *Calender v. Milligan*, 11 D. 1174; *Page v. Buchan*, 17 D. 1079; *Cameron v. Hamilton*, 18 D. 423;

(*b*) Per Lord Young, *ib.*; see *Ferguson v. Colquhoun*, 24 D. 1428.

however erroneous. The pursuer was bound to give such particulars as implied recklessness and gross negligence, and the record being defective upon that point the action was dismissed—Lord Deas dissenting (a). In a subsequent action against the fiscal arising out of the same case, the jury were directed that if they were satisfied upon the evidence that there was reasonable ground for the defender thinking that the pursuer had recently given birth to a child, and such child was not forthcoming or accounted for, there was probable cause for the proceedings taken by him; but if they were of opinion that there was no reasonable ground for so thinking, the proceedings in the case were without probable cause in the sense of the issues. The jury took the latter view, and found the fiscal liable in damages (b).

Officers of Police.—To subject another to any form of restraint is *prima facie* a wrong for which he is entitled to redress. If a man be turned back on a road on which he is entitled to travel, prevented from crossing a bridge open to the public, ejected from a public conveyance, turned out of a public meeting, or given into custody, the person responsible for this interference with his personal liberty must justify the proceeding. In general, no one is entitled to lay hands on another except under a judicial warrant; but by the General Police Act, any person found committing an offence may, without a warrant, be taken into custody by any police constable, or apprehended by the owner of the property on, or with respect to which, the offence shall be committed, or by his servant, and may be detained until he can be delivered into the custody of a police officer (c). But where some time has elapsed since the commission of the offence, and there is no reason to suspect the defender of an intention

(a) *Urquhart v. Grigor*, 3 M. 283. In modern practice, the pursuer would have been allowed to amend, and the case sent to trial. (c) 25 & 26 Vict. cap. 101, sec.

(b) *Urquhart v. Dick*, *sup.* Thus 414.

to abscond from justice, a warrant is necessary, and the officer should have it in his possession ready to produce as his authority; for otherwise the person sought to be apprehended may lawfully resist.

An officer is also sometimes obliged to act without a warrant, as when the crime is committed before his eyes, or he sees a man running away who is pointed out to him as the guilty person. If, again, the criminal is in hiding, an officer who is credibly informed, and has good reason to believe that he is about to abscond, may *de plano* apprehend him to prevent justice being defeated. The same would hold if the crime believed to have been committed was murder or the like, of which the punishment is so severe as to render absconding probable and natural. Still further, if the suspected individual belongs to a class of persons reputed to live by crime, or who have no fixed residence, and no means of honest livelihood. In all such cases a constable has large powers to act of his own authority; but he is never entitled to overstep the necessity or reasonable requirements of the particular case, and whenever he has no warrant, it is his duty to carry his prisoner as soon as possible before a magistrate, and obtain authority for his detention. If the individual suspected or accused of crime be a well-known householder and law-abiding, and not likely to flee from justice, a police officer would act illegally in apprehending him without a warrant, and would be liable in damages (a).

It is not an assault for a policeman, when on duty at a racecourse or other public gathering, to eject a person whom he knows from his antecedents to be a suspect person (b).

When an officer is provided with a warrant *ex facie* regular, he is protected; and if, unknown to him, it has been procured in an illegal way, it is the party to blame, and not the officer, who is answerable in damages for what may be done under it. But a warrant properly obtained may be executed in an illegal way. It is the duty of the officer to

(a) *Peggie v Clark*, 7 M. 89.

(b) *Wallace v. Mooney*, 12 R. 710.

bring his prisoner before a magistrate with as much despatch as may be attainable in the circumstances. Being responsible for him till he is placed in the magistrate's presence, he is not entitled to part with his person at any time during the interval. He must be careful, however, to treat his prisoner with all the humanity consistent with safe custody. If, from the remoteness of the district in which the prisoner has been found, the unseasonableness of the hour, the temporary absence of the magistrate, or a necessity of the like description, the prisoner requires to be kept in some secure place over night, or for some short space, the messenger, in such an emergency, is entitled to lock him up; but as it is he who is responsible for his forthcoming, he cannot delegate the duty of detention to the keeper of a jail, or a company of soldiers, or any other person. His temporary confinement is not like the committal of a magistrate, who alone can commit to prison, but is part of the messenger's safe custody. In short, he has the power of detention, but not of imprisonment. "Detention," says Lord Chelmsford, "is of various kinds. It may be by the officer keeping hold of the person arrested and detaining him in that manner. It may be by locking him up in a room under charge of some persons, who are entrusted to watch over him while the officer goes for the purpose of finding some justice of the peace." And he adds, that as such detention would be lawful in every case where the room, or the parties who were watching that room, were under the control of the officer, detention in a jail or lock-up house is equally lawful; because, although the place of confinement is then under the charge of a jailor, it is not a change of custody so long as they are holding him upon the authority of the officer (*a*).

This being so, the officer is plainly responsible for everything done by him, or suffered to be done by him, to the prisoner till he is brought face to face with the magistrate. He is bound to see that the cell or chamber in which he is put is suitable for the purpose,—that is to say, that it is not

(*a*) *Evans v. M'Loughlan*, 4 Macq. 89, 101.

likely to be injurious to health, or uncomfortable to an extent amounting to oppression. Thus a party of prisoners apprehended for the purpose of being brought before the sheriff-substitute for examination, were, in the course of the journey thither, placed in a small stone safe, only 3 feet 9 inches broad and 6 feet 11 inches high, in a house occupied as a guard-house by a company of soldiers. In an action of damages for this oppressive treatment, the jury were told to disregard the fact of the imprisonment being the act of the soldiers. If they were imprisoned by others, with the knowledge of the messenger, it was his duty to have previously ascertained the state of the premises, and so prevented it; and whether he was aware of it or not, he was still answerable, because, "except in the special case of a pressing emergency, such as did not occur here, no civil officer, having prisoners under a warrant for examination, is entitled to hand his prisoners over to the military, and so discharge himself of the custody of their persons" (a).

In the same case it was laid down, in regard to the responsibility of an assistant by whom the officer was accompanied, that if he knew of the improper confinement and failed to remonstrate, he was liable, notwithstanding of his having abstained from taking any active part in the oppression of which his principal was guilty.

As to the execution of search warrants, etc., the same rule applies. "If the defender applied to the proper authorities in the regular manner, and obtained a regular warrant, which was executed by the proper officers, then the entry and seizure are not illegal. They may well be the cause of injury and give rise to a claim of damages, if the party applied for and obtained the warrant maliciously, and without probable cause, as that party is responsible in damages for all that followed on a warrant so maliciously obtained. But then the ground of complaint is, that he did so apply maliciously for the warrant, and therefore—but only on that account—that what followed, in its execution, though legal and regular,

(a) *Ross v. M'Bean*, 8 D. 250, 253.

was wrong. The whole gist of the complaint in such a case is the malicious application for the warrant. If that is made out, the party is responsible in damages for what happened, although all that followed was regular and legal" (a).

In general, a public functionary is only liable for his own personal delict. The head of a department, such as the superintendent of police, is not answerable for the illegal proceedings of his subordinates; nor, where an office is held by two persons jointly, such as that of fiscal within burgh, is the one responsible for the negligence of his colleague. The principle of secondary responsibility flowing out of the relation of master and servant has no application to such a case. They are all servants of the public, but not of one another; and the mere circumstance that they are an organized body, subject to the control and bound to obey the orders of a superior, does not make the latter liable for their misconduct, unless the act complained of was executed by his express orders, or he was otherwise participant in its commission (b).

The Public.—When a person informs the police of what he knows respecting a crime, he is simply doing his duty as a citizen; and if he states only what he knows and honestly believes, he cannot be subjected to an action of damages. If the suspected person should prove to be innocent, the party making the charge to the proper officers or a police magistrate is submitting it to those who are to judge of its probability; and unless it can be said that he acted not in the discharge of his duty, but from some illegitimate motive, and without reasonable grounds for his belief, an action against him is not maintainable (c). Mere innocence is never proof of want of reasonable and probable cause; except when accompanied by circumstances showing that the accuser was conscious of the falsehood of the charge, or acted recklessly in preferring it,

(a) *Per. L. J.-C. Hope in Graham v. M'Lachlan*, 15 D. 889, 895. (c) *Lightbody v. Gordon*, 9 R. 938; *Sheppard v. Fraser*, 11 D.

(b) *Bain v. Burnet*, 19 D. 405; 446; and cases noted *sup.* (b) 300. *Thomson v. Mitchell*, 1 Rob. 162.

without taking proper care to inform himself of the true facts (a).

Men are often obliged to act on appearances ; but this does not mean that they are to act on mere conjecture, and put a false or unreasonable construction upon what they hear or see. But wherever the apparent facts would have led a person of ordinary caution and prudence to entertain the belief that the accused was morally guilty of the offence charged, he is exonerated from all civil responsibility, although in the end the accused may be found to be innocent. Thus, where a forged cheque was presented by a boy at a bank, and paid by the teller, in the belief that he was a shopman of a customer A., and it afterwards appeared that A. never got the money, or had heard of the cheque on which the boy was put on his trial and acquitted, the teller, who had given the information to the police, was found not liable in damages. The Court said that if he conscientiously believed that it was A.'s boy who did present the cheque, he was bound to tell the police that they might sift the matter further, and take such action as they thought proper. It had been argued *contra* that he was bound first to investigate the matter before doing anything ; but the Lord President said that if the defender had proceeded to make any such investigations, he would have been stepping outside the line of his duty altogether. His duty was to go to the authorities with his own unaided statement, neither more nor less, and tell them what he knew without exaggeration, and then to leave the matter in their own hands (b).

(a) Bowen, C. J., *Abrath*, *sup.* 462.

(b) *Lightbody*, *sup.*

CHAPTER XII.

INFRINGEMENT OF COPYRIGHT, PATENTS, AND TRADE MARKS.

COPYRIGHT is defined the sole and exclusive right of printing or otherwise multiplying copies of any subject to which the term is applicable, namely,—

1. Books.
2. Musical Compositions.
3. Dramatic Pieces.
4. Lectures.
5. Engravings, and works of that kind.
6. Paintings, Drawings, Photographs.
7. Sculpture.
8. Designs (*a*).

Until publication there is no room for copyright, which is the creature of statute, for the person to whom a manuscript belongs is the arbiter of its fate so long as it is unpublished; and the fact that lectures have been read to a University class (*b*), that a poem has been declaimed by an actor (*c*), that a work has been represented on the stage, is not publication in this sense (*d*). But after publication this

(*a*) The following are the leading Copyright Statutes:—

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| <p>1. <i>Books, Magazines, Maps, etc.</i>—5 & 6 Vict. c. 45; 39 & 40 Vict. c. 36.</p> <p>2. <i>Music and the Drama.</i>—<i>a.</i> Musical Compositions—5 & 6 Vict. c. 45; 3 & 4 Will. IV. c. 15; 45 & 46 Vict. c. 40. <i>b.</i> Dramatic Pieces—5 & 6 Vict. c. 45; 3 & 4 Will. IV. c. 15.</p> <p>3. <i>Lectures.</i>—5 & 6 Will. IV. c. 65.</p> <p>4. <i>Fine Arts.</i>—<i>a.</i> Engravings,</p> | <p>Etchings, Prints—8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; 6 & 7 Will. IV. c. 59; 15 & 16 Vict. c. 12; 25 & 26 Vict. c. 68. <i>b.</i> Paintings, Drawings, Photographs—25 & 26 Vict. c. 68. <i>c.</i> Sculpture—54 Geo. III. c. 56.</p> <p>5. <i>Designs.</i>—46 & 47 Vict. c. 57.</p> <p>(<i>b</i>) <i>Caird v. Sime</i>, 12 App. Ca. 326.</p> <p>(<i>c</i>) <i>Tinsley v. Lacey</i>, 1 H. & N. 747.</p> <p>(<i>d</i>) <i>Macklin v. Richardson</i>, 2 Amb. 694.</p> |
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right of control, which is practically a right of property, ceases to exist. The common law deals with an author and an inventor in an even-handed manner. The inventor, like an author, may prevent the fruit of his brain from being copied and reproduced without his leave; and so, too, may the owner of a work of art (*a*). But once he has disposed of a single copy it may, so far as the common law is concerned, be copied by any person who properly obtains possession of it (*b*).

As to a private letter, the copyright remains in the writer after transmission, except in so far as the circumstances of the case may entitle the addressee to give it to the world; but the property in the material of the letter passes to him to whom it is sent, so as to entitle him to destroy or transfer it (*c*).

It would appear that to give copyright, the first publication must be in the United Kingdom; and there is no copyright in immoral, irreligious, seditious, or libellous publications (*d*). The area over which it extends is the whole of the British Dominions, and protection is granted to every author who first publishes in this country, no matter what his nationality may be.

Copyright can only be invaded in three modes. (1) When the publication challenged is an unauthorized edition of a copyright book,—such as a foreign reprint imported into this country,—which is open piracy. (2) When, in a book pre-

(*a*) *Pr. Albert v. Strange*, 2 De G. & Sm. 652.

(*b*) *Jeffreys v. Boosey*, 4 H. L. Ca. 815.

Whether apart from statute an author has a property in the order of words devised by him, is a question on which there has been much discussion. See Lord Gifford's opinion in *Tennyson v. Forrester*, Feb. 10, 1871, 43 Scot. Jur. 278.

The three great cases on the subject are—*Miller v. Taylor*, 4 Burr. 2303; *Donaldson v. Becket*, 4 Burr. 2408; *Jeffreys v. Boosey*, *sup.* See

also the valuable Digest printed in the Report of the Royal Commission on Copyright of 1878, p. 90. The Digest is the work of Mr. Justice Stephen, a member of the Commission, and will be cited in this chapter as "Dig."

(*c*) Dig. art. 3; *Cadell v. Stewart*, M. App. Lit. Prop. 4; *Cadell v. Robertson*, 5 Pat. App. 493; *Routledge v. Low*, L. R. 3 E. & I. App. 100.

(*d*) *Macfarlane v. Oak Foundry Co.*, 10 R. 801.

tending to be original, the writer or compiler illegitimately appropriates another's labours, which is simple theft; and these, says L. J. James, are the two modes of invasion against which the Copyright Acts protect an author. But, he adds, there is another mode against which the law affords a remedy, wholly irrespective of any copyright legislation—where a man sells a work under another's name, or falsely represents it to be a well-known work, which is a common-law fraud. Before a man can establish any complaint, he must bring his case under one of these three heads (*a*).

If a work is published under some fancy title, the publisher may prevent another work being sold under the same name; and so as regards a newspaper, or in fact any article of commerce which has acquired a reputation in the market with a certain name stamped on it. The title to the name depends on user—that is to say, there is no property in the name, and the publisher has no right to the exclusive use of it till he has so used it as denoting his newspaper (*b*).

But copyright can only exist in something original, and the adoption of a phrase, or some hackneyed form of words, as the name of a book, gives no copyright in the title (*c*).

An author is entitled to make a “fair use” of a previous publication. It may be referred to for the purpose of checking results independently worked out, or as a guide to authorities independently consulted. It is also lawful to make extracts reasonable in quality, number, and length, and even to borrow ideas, provided he does not slavishly copy the words.

The public representation of a dramatic piece founded on a novel is not an infringement of the copyright of the author of the novel; but the printing of the drama as a book may constitute such infringement. Thus two persons may, inde-

(*a*) *Dicks v. Yates*, L. R. 18 Ch. 307, 314; *Lic. Vict. Newspaper Co. v. Bingham*, L. R. 38 Ch. Div. 76, 90.

(*b*) Per Lord Westbury in 139.
M'Andrew v. Basset, 10 L. T. N. S. 445; *Maxwell v. Hogg*, L. R. 2 Ch. D. 76.

(*c*) *Dicks v. Yates*, L. R. 18 Ch.

pendently of each other, convert a novel into a drama, and each will have the right of representing his own dramatic piece, although one may be the author of the novel, and both dramas may have parts in common (*a*). But the Dramatic Copyright Act (*b*) extends the protection given to other published works to dramatic pieces published only by representation on the stage. The statute forbids the reproduction of the drama, or any part thereof—meaning a material or substantial part. And what is a material part does not depend on its length—it may be a song, which has been the chief “point” in the success of the play (*c*); but where two whole scenes were taken bodily from another play of the same name, the Court, looking to the general character of the two dramas respectively, considered that the effect on the total composition was so small that there was no substantial taking of any part of the one from any part of the other (*d*).

In an action for breach of copyright the measure of damages has been thus defined. The defendant is to account for every copy of his book sold as if it had been a copy of the pursuer's, and pay the pursuer the profit which he would have received from the sale of so many additional copies (*e*).

Patents.—A patent is now granted in the form and subject to the conditions prescribed by the Patents, Designs, and Trade Marks Act of 1883. In effect it is a contract between the inventor and the public, whereby, in consideration of his communicating something new and useful, he shall enjoy the exclusive use and benefit thereof for a certain term (*f*). But

(*a*) *Toole v. Young*, L. R. 9 Q. B. 523.

(*b*) 3 & 4 Will. IV. c. 15; 5 & 6 Vict. c. 45.

(*c*) *Planche v. Braham*, 4 Bing. N. C. 17.

(*d*) *Chatterton v. Cave*, L. R. 3 App. Ca. 483.

(*e*) *Pike v. Nicolas*, L. R. 5 Ch. 260.

(*f*) The recitals in letters patent are taken to be representations made to the Crown by the patentee, for the truth of which he is responsible; and if they are untrue the patent is void, not only as against the Crown, but as against a third person. *Morgan v. Seaward*, 2 M. & W. 561; *Bedells v. Massey*, 7 M. & G. 630.

the secret communicated need not be the product of his own brain. Soon after the Statute of Monopolies (21 Jac. I. c. 3) was passed, a question arose whether a man who had never invented anything, but had imported something from abroad, was "the first and true inventor;" and it was decided that he was, if the invention, being otherwise useful, was previously "unknown" in this country. It is accordingly now held that letters patent may be granted to a foreigner resident abroad for an invention communicated to him by another foreigner also resident abroad (*a*). Next, it was decided that of two persons who invented the same thing simultaneously, he was the first and true inventor who first took out a patent for it; and then, says Sir G. Jessel (from whom the above illustrations are cited), "there arose another point: If the man who took out the patent was not, in popular language, the first and true inventor, because somebody had invented it before, but had not taken out a patent for it, would he still in law be the first and true inventor? It was decided he would, provided the invention of the first inventor had been kept secret, or, without being actually kept secret, had not been made known in such a way as to become part of the common knowledge or of the public stock of information" (*b*). It follows that if the public once becomes possessed of an invention by any means whatever, *e.g.* if it is clearly described in a book, no matter what, and printed in any language, English, French, German, or any tongue commonly known in this country, no subsequent patent for it can be granted, either to the true inventor himself or any other person (*c*). From the moment the book has been exposed for sale there becomes, in point of law, a complete publication of the invention. The same follows if the book is to be found in the Patent Office or any other public library to which persons would naturally go

(*a*) Wirtz' Patent, L. R. 12 Ch. 33; *Lang v. Gisborne*, 31 Beav. 133; D. 303. *Harris v. Rothwell*, 2 R. 35 Ch. D.

(*b*) Sir G. Jessel, *Plympton v. Malcolmson*, L. R. 3 Ch. D. 531, 556. *Otto v. Steel*, L. R. Ch. D. 241; Nitro-Glycerine Co.'s Case, L. R. 21

(*c*) Hindmarch on Patents, 1 Ed. Ch. D. 720.

for information; and "prior use," as a method of diffusing a knowledge of the supposed invention, is equally fatal to the patent (*a*).

This explains the importance which is attached to the patentee making a full disclosure of what his invention consists. He is required to lodge along with his application a "specification," the function of which, by means of drawings and letterpress, is to give a full description of the machine, and of its practical working. This is first done in a "provisional" form, describing "the invention fairly, no doubt, but in its rough state until the inventor could perfect its details" (*b*), reserving for the final specification full details. The two documents, however, must be consistent, they are published together, and become parts of the same document; and it is now made matter of statutory requirement that the complete specification shall "end with a distinct statement of the invention claimed." The real object of the claim is to make it clear that everything is disclaimed which is not claimed (*c*). The inventor says in effect, "Although I have described the whole machine, I do not mean to claim it all; I only claim the part of it which is new, and which is this" (*d*).

The question whether the machine has original merit, has to be determined by a consideration of the state of the art or manufacture at the date of the patent, and the improvements described in the specification. That document, of course, has to be fairly construed, like any other written document, subject to this, that it is addressed, not to the world at large, but to a particular class, composed for the most part of skilled mechanics; and the Court has, by the admission of evidence or otherwise, to put itself in their position, and find what the words of the specification mean as they would be understood

(*a*) *Bailey v. Robertsons*, L. R. 3 App. Ca. 1055.

(*c*) *Siddell v. Vickers*, L. R. 39 Ch. D. 32.

(*b*) Per Sir G. Jessel in *Stonar v. Todd*, L. R. 4 Ch. D. 58; *Gillies v. Dunbar*, 5 R. 337.

(*d*) *Plympton v. Spiller*, L. R. 6 Ch. D. 426.

by a skilled mechanician when applied to such a subject-matter (*a*). The specification is not now read in a spirit of hostility to the patentee, but with a desire to support a really useful invention, if it can be supported on a reasonable interpretation of the patent (*b*).

To an action for infringement it is no answer that the defender was unaware of the existence of the patent; for if in point of fact there has been infringement, the injury is none the less because it was done in ignorance (*c*). It is equally immaterial whether the extent of the infringement was great or small; and an infringer who has been convicted of using any part of the apparatus covered by the patent in the production of his manufacture cannot urge that, independently of the patent, he might have attained the same result equally beneficially by other means. His goods are stamped with illegality the moment it appears that he has used the patent to any extent in preparing them for the market, and the damages are to be assessed on the footing that the competition to which the patentee was subjected was illegal (*d*).

A man cannot have a patent for a principle alone, but he may have one for a principle coupled with a mechanical contrivance by which the principle is carried into effect. The inventor (as in the celebrated hot blast case) has made a new discovery, and by a certain form of apparatus has attained entirely new results not known before; and although it may not be the only, or indeed the best form of apparatus, he is entitled to be protected against all other processes for reaching the same end. Otherwise he would fail to derive the full benefit of his discovery (*e*).

But when the invention consists of a new method of arriv-

(*a*) Per Lord Blackburn, *Clark v. Adie* (No. 2), L. R. 2 App. Ca. 423, 436. (*d*) *Horse Nail Co. v. Stewart*, L. R. 13 App. Ca. 401; rev. 14 R. 266.

(*b*) Per Sir G. Jessel, M. R., *Plympton v. Spiller*, L. R. 6 Ch. D. 412, 422; appd. Fry, J., *Wegeman v. Corcoran*, L. R. 13 Ch. D. 65, 77. (*e*) *Househill Coal & Iron Co. v. Neilson*, 1 Web. Pat. Ca. 685; *Jupe v. Pratt*, *ib.* 146; *Badische Anilin, etc., Fabrik v. Levinstein*, L. R. 24

(*c*) *Curtis v. Platt*, 11 L. T. 245; *Stead v. Anderson*, 4 C. B. 886. Ch. Div. 156.

ing at a known result, or is merely an improvement on an existing machine, the existence of the patent does not prevent any other person from using another and different process, or of introducing further and different improvements on the same machine. When, says Lord Westbury, "the idea is nothing in the world more than the discovery of a road to attain a particular end, it does not at all interfere with another man discovering another road to attain that end, any more than it would be reasonable to say that if one man has a road to go to Brighton by Croydon, another man shall not have a road to go to Brighton by Dorking" (a).

In a patent for an entire instrument composed of different parts, we have an example of a combination which, when new and useful, is a good patentable subject. The novelty is the combination of the parts which have never been combined in the same manner before, although all or some of them are old; and if the claim is for a combination only, it is not necessary for the patentee to distinguish between what is new and what is old. Whether the combination claimed is new or not is a question of fact to be proved at the trial, and the utility has to be proved also; for to make it a good patent, either the result produced must be entirely new, or if not new, it must be produced in a more useful and beneficial way. Further, protection may be claimed not only for the combination as a whole, "but of some subordinate part of it," or of some new thing entering into the combination on the ground that it is itself new (b).

A combination may be infringed in three different ways: (1) by taking the whole instrument without change from beginning to end; (2) by making another machine resembling the patent in many of its parts but not in all; and (3) by taking, not the machine, but some subordinate integer, which has been separately claimed as novel, and of the patentee's

(a) *Curtis v. Platt*, Goodeve's Pat. Co., 2 R. 857, 1 App. Ca. 584; Cases, 102, L. R. 3 Ch. D. note, 135, *Clark v. Adie* (No. 1), L. R. 2 App. Ca. 315.

(b) *Harrison v. Anderston Foundry*

invention. If, however, nothing is claimed but the combination, there is no infringement unless the whole combination is used (*a*).

This, however, which is the general rule, is subject to an important qualification, which has been thus stated by the Lord President: "I am not to be understood as saying that an infringer, by merely omitting some immaterial part of the mechanism described in the specification, or substituting for such immaterial part some mechanical equivalent, will escape conviction if his machine contains all the essential and characteristic features of the patented combination. But if in the machine of an alleged infringer any material part of the patented combination is omitted, then the combination used by the alleged infringer is a different combination from that of the patentee. The omission of one material part may be an improvement or the reverse. The possibility of dispensing with it may be a valuable discovery, or the omission may be made merely for the purpose of avoiding an infringement; but in either case the combination of the patentee, *minus* an essential part of it, is no longer his combination" (*b*).

The infringement is usually disguised in such a way as to make the pirated machine "colourably" different. The phrase colourably is apt, says Lord Blackburn, to mislead. If *part* of the property in the invention be really taken, there is an infringement, however much that may be disguised or sought to be hidden. If that is detected by the patentee, and if what is taken is really part of his property given to him by the letters patent, he has a right to proceed against the infringer however ingeniously the colours may have been contrived to try to conceal the fact that there has been a taking of part of the property. But for all that, it is not correct to say that doing anything that answers the same object is necessarily an infringement of the specification (*c*). The nature of the in-

(*a*) *Harrison, sup.* (Lord Chan. Cairns and Lord Chelmsford). (*c*) *Dudgeon v. Thomson*, L. R. 3 App. Ca. 34, 53.

(*b*) *Gwynne v. Drysdale & Co.*, 13 R. 684.

vention has to be considered, and "it may well be that if the instrument patented consisted of twelve different steps, producing in the result (the particular improvement), an infringer who took eight or nine or ten of these steps might be held by the tribunal judging of the patent to have taken in substance the pith and marrow of the invention, although there were one, two, three, four, or five steps which he might not actually have taken and represented upon his machine." In this manner omission will not aid the infringer, if the substance and essence of the invention be taken (*a*). Nor will substitution, if it be only a mechanical equivalent, introduced to render the infringement more difficult of detection. Nay, even if it be an improvement, it will not justify the appropriation of the substance of the patent; and the same may be said as to additions. This, at least, is true of what is an entirely new machine—a pioneer invention as it has been called. In a patent for an improvement on an existing machine, for the reason already explained, the patentee must be tied down strictly to the invention which he claims, and the mode which he points out of effecting the improvement (*b*).

In a suit for infringement a patentee may elect between claiming an account of the profits made by the infringer from the use of his invention, and asking damages generally in respect of the infringement. In the former case the infringement is condoned, the defender is treated as if he were a trustee for the patentee, and the only question is, what advantage has the infringer derived from the use of the patent over and above what he would have got for the use of processes open to the public? (*c*). But in an action of damages for infringement, the question is, not how much has the infringer made, but how much has the patentee lost through

(*a*) Per Lord Cairns in *Clark v. Adie* (No. 1), *sup.*; *Proctor v. Bennis*, L. R. 36 Ch. D. 740, 756; (*c*) Lord Kinnear in *United Horse Shoe & Nail Co. v. Steuart*, 14 R. (H. L.) 38. 266; *Betts v. De Vitre*, L. R. 5 H. L.

(*b*) *Proctor v. Bennis*,—an ex-1; *Mouray v. Whitney*, 14 Wall. 620.

the other's wrongful interference with his trade. If the inventor has sought his profit by allowing any one to use the apparatus on payment of a licence, the inquiry is simple enough; for we have but to ascertain the number of machines made by the defender, and charge him with the proper royalty on each. The pursuer is entitled to receive from him what he gets from everybody else, but no more (*a*). And if the royalty has already been paid by the user of the machine, no further royalty is payable by the manufacturer. If, again, the inventor grants no licences, but, keeping the manufacture in his own hands, charges the public his own price, a question of a different kind arises. He is entitled to a manufacturer's profits, on the footing that all the machines made by the defender would have been made by him in the ordinary course of events; and if the patent covers the entire machine, this will be the full profit made off each. But when it consists of an improvement on some subordinate part, *e.g.* the whistle of a locomotive, the profit given will be the profit of the whistle, and not of the entire locomotive. Lastly, a patentee may seek his reward neither by charging a royalty nor manufacturing the machine for the purpose of sale, but by selling the commodity which the patented article is employed to manufacture. The matter now for inquiry is, what is the value of the disturbance caused to his trade or business by and through the infringer's wrongful competition? The patentee has used his invention for the purpose of securing to himself a monopoly—a monopoly which might obviously be affected by a diminution in the demand as well as diminution of the price. It may not be always easy to prove that a decreasing trade and a diminished revenue was not due to other causes than the appearance of the infringer as a rival in the field. But when the evidence on the point is reasonably satisfactory, there is no doubt that both elements ought to enter into the calculation. In the language of the Supreme Court of the United States (*b*), “the difference between the patentee's

(*a*) *Penn v. Jack*, L. R. 5 Eq. 81, 85.

(*b*) *Yale Lock Co. v. Sargent*, 117 U. S. Rep. 536.

pecuniary condition after the infringement and what his condition would have been if the infringement had not occurred, is to be measured, so far as his own sales are concerned, by the difference between the money he would have realized from such sales if the infringement had not interfered with his monopoly, and the money he did realize from such sales. If such difference can be ascertained by proper and satisfactory evidence, it is the proper measure of damages."

Designs.—A design, if it be "new or original, not previously published in the United Kingdom," is registrable under the Act (*a*), and the owner is thereafter entitled to proceed against an infringer. A design is a design for any article of manufacture,—whether applicable to the pattern,—the shape or configuration,—the ornament thereof, or any two or more of such purposes (*b*).

It is no objection that in the shape there really lies an important mechanical improvement, which might have been made the subject of a patent; nor that it does not depict an article complete in itself—*e.g.* the door of a kitchen range (*c*). It is not publication to show it in confidence to an agent, but it is so to show it before registration to a customer for the purpose of obtaining an order (*d*).

Trade Marks and Trade Names.—The principle on which the Court has interfered in cases of this kind is that no man shall sell his goods as the goods of another (*e*). A maker or vendor is at liberty to designate his wares so as to distinguish them from others by the use of names and symbols, and he is entitled to say, not that other persons shall not sell the same things,—be they better or worse,—but that they shall not sell them in such a way as to confound their identity. This is

(*a*) 46 & 47 Vict. cap. 57, § 47.

(*b*) *Ib.* § 60.

(*c*) *Walker, Hunter, & Co. v. Falkirk Iron Co.*, 14 R. 1072.

(*d*) *Blank v. Footman, Pretty, & Co.*, L. R. 39 Ch. D. 678.

(*e*) *Leather Cloth Co. v. American Cloth Co.*, 11 H. L. C. 538; *Perry v. Truefit*, 6 Beav. 66.

the difference between a trade mark and copyright (*a*). Copyright protects the substance; a trade mark preserves the identity, by indicating where, or by whom, or at what manufactory the article to which it was affixed was manufactured. By the common law, therefore, as soon as a trade mark has been employed in the market to designate that the goods on which it is stamped are the goods of a particular firm, it becomes the exclusive property of the firm, and no one is entitled to apply it to goods of the same or similar description. If they are different, no harm is done, and the same device may be used by different makers for such different things as "cigarettes, hats, soap, and pickles" (*b*). In order that this right may be more generally available, it is now enacted by the Patents, Designs, and Trade Marks Act, that all trade marks shall be registered, and that registration of the proprietor of a trade mark shall be *prima facie* evidence of his right to the exclusive use of it.

The remedy is interdict and damages, and the question raised is how far the defender's trade mark bears such a resemblance to that of the pursuer's as to be calculated to mislead incautious purchasers (*c*). It is not necessary to prove that any one was in fact misled; but if "he cannot allege and prove that the public are deceived, or that there is a reasonable probability of deception, he has no right to interfere with the use of the name by others" (*d*).

Originally the Court appears to have interfered in such cases on the ground of fraud,—the fraud alleged being that goods of inferior quality to those of the pursuer were knowingly palmed off on the public as if they were of his make. In such a case the person primarily injured was he to whom the false representation had been made, namely, the buyer who had been deceived and imposed upon; but it was

(*a*) 25 & 26 Vict. c. 88, § 76.

(*d*) Per Ld. Watson in *Singer Co.*

(*b*) Lord Watson in *Somerville v. v. Loog*, L. R. 8 App. Ca. 15, 39, explaining *Id. v. Kimball & Morton*,
Schembri, L. R. 12 App. Ca. 453.

(*c*) *Johnston v. Orr Ewing*, L. R. 11 M. 267.

7 App. Ca. 219.

felt that a wrong had been done to the manufacturer also, both by the diversion of his trade and the depreciation of his manufacture. He was therefore found entitled to sue for the false assumption of his trade mark (*a*). But gradually and by successive steps the ground of action has come to be less onerous. In the first place, it was decided that the circumstance that the goods which had been palmed off as genuine were really not inferior to the genuine article, was immaterial (*b*). Next, it was held that the remedy was competent even when there was no deception as between the original parties to the transaction, if the trade mark with the buyer's consent had been put on to enable him to sell at an advantage (*c*). And, lastly, it was decided that to the success of the application proof of an intention to mislead was unnecessary. Even when a trade mark was put on innocently and in ignorance that it belonged to anybody else, the owner of the mark had nevertheless a right of action, for otherwise goods would pass from hand to hand as if they were of his manufacture, when in fact they were not (*d*). In fact, a trade mark and a trade name now began to be considered as property (*e*), and as part of the goodwill of a business,—a right which passed to a partner when he joined the firm, or which might be disposed of along with the other assets. But in all the cases relating to trade marks the essence of the complaint made to the Court always has been that there has been an untruthful representation which (as in the case of a rival newspaper stealing the name of an old and well-established journal) is calculated to deceive persons into the belief that the new paper had some connection with the old one in a way likely to injure the latter (*f*).

By the Merchandise Marks Act of 1887—which was

(*a*) Per Mellish, L. J., in *Singer Co. v. Wilson*, L. R. 2 Ch. D. 434, 453. (*d*) *Mellington v. Fox*, 3 My. & Cr. 338.

(*b*) *Blofield v. Payne*, 4 B. & Ad. 156. (*e*) *Hall v. Barrows*, 4 D. J. & S.

410; *Edelston v. Edelston*, 1 D. J. & S. 185. (*f*) *Borthwick v. Evening Post*, L. R. 37 Ch. D. 449.

(*c*) *Sykes v. Sykes*, 3 B. & C. 541.

passed for the further protection of the public against the false marking of goods (by making certain uses of trade marks and trade descriptions a criminal offence)—it is enacted that “on the sale or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of the Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor at the time of the sale or contract to, and accepted by the vendor” (a). *Inter alia*, an offence is committed under the Act by the false application to goods of any mark so nearly resembling a trade mark as to be calculated to deceive, unless the defender “prove that he acted without intent to deceive.”

In the action of damages for the wrongful imitation of a trade mark two questions are usually put to the jury (b). In the first place, they have to say whether the defenders’ mark bore such a resemblance to the other as in its own nature to be calculated to deceive the unwary, or persons who were moderately skilled in the article, and to injure the pursuer’s sale. Next, they had to find what was the intention of the defenders in using the mark complained of, whether it was for the purpose of supplanting the complainer, or done in the usual course of trade, and in the execution of foreign orders sent to their house. It has been thought that without such a fraudulent intention existing at least before notice, damages are not due (c). But in a recent case this point was treated in the House of Lords as an open question (d). That fraud is not necessary to be proved in order to obtain protection by interdict has already been shown; and if the use of the trade mark has been wrongful, the defender should make good the damage of which he has been the cause (e).

(a) Sec. 17.

(b) Sec. 2.

(c) *Cranshaw v. Thomson*, 2 Man. & G. 357.

(d) Per Ld. Blackburn in *Singer Co. v. Loog*, *sup.* p. 32.

(e) See Lord Cairns in *Singer Co. v. Wilson*, L. R. 3 App. Ca. 376, 391.

CHAPTER XIII.

MASTER AND SERVANT.

SECTION I.—MASTER'S RESPONSIBILITY TO THE PUBLIC FOR SERVANT'S ACT.

Civil Responsibility.—It has long been settled that a master is civilly responsible for the fault of his servant; but the reason is nowhere very clearly stated. It is not in the Roman law; for according to that system, though a master was liable for the act of his slave, much in the same way as for his four-footed beast, this does not touch the question of liability for a wrong done by the hand of another. Blackstone (a) assigns the rule to the fiction of an "implied command;" but this is no more satisfying than the maxim which is often cited in its support, *respondeat superior*: or that other maxim, *qui facit per alium facit per se*, which in many cases has no application, seeing that the servant's act was not only unauthorized but forbidden. That a master may to some extent protect himself by using care in the selection of his servants may be granted; but this is evidently not the reason of the rule either, otherwise it would be a good defence to show that the offending servant was a competent and trustworthy person, which is certainly not the case. In the first case in Scotland in which the question arose, the employer was held liable for the damage caused by his servants when clearing a moss, of heath and brushwood, to which they had set fire (b). They had been sent to clear the moss, but not in the way adopted; and the case, therefore,

(a) Coms. i. 417.

679, as corrected by Lord Pitmilley

(b) *Keith v. Keir* (1812), 16 F. C. in *Baird v. Hamilton*, 4 S. 797.

decides that the master's responsibility is all the same whether the servant's duty was precisely defined by express orders, or something is directed to be done, and the manner of doing it is left wholly to the discretion of the servant. It follows that the law treats the servant as the master's deputy to do a certain class of acts; and in the application of the rule it was but a short step to refuse all inquiry into the instructions given by the master to the servant, whenever the relation is established, and it is proved that the act causing the mischief was within the recognised limits of his duty. Accordingly, in the later case of *Fraser v. Dunlop*—where damages were claimed for an injury done by a horse and cart—the principle was broadly affirmed that a master is liable for his servant's negligence (a).

The ground on which this responsibility rests appears to have been further discussed in a case which occurred in the year 1826 (b). A child playing in front of her father's door was knocked down and injured by a passing horse and cart, when the driver was loitering some yards in the rear. On the question whether the master was liable for his servant's negligence, it was argued that the general rule was *culpa tenet suos auctores*, and to infer liability it was necessary to trace *culpa* to the master, by showing, for example, that he had committed to a single servant more horses than he could possibly manage, or had continued in his employment a servant who had previously shown himself careless. But where no such negligence appeared, and no *culpa* could be imputed to him, the master was no more answerable for injury occasioned by any accidental carelessness on the part of the servant than he would be for the damage caused by the sudden fury of a domestic animal which had never shown any disposition to do mischief.

This argument, which the Court rejected, states concisely the difficulty that has been felt in assigning this secondary liability of the master for his servant's act to any legal

(a) 1 S. 258.

(b) *Baird v. Hamilton*, 4 S. 797.

principle, and which recent discussions in and out of Parliament cannot be said to have removed. An employer is liable for the conduct of his servant in carrying out a contract which he has been authorized to execute on his master's behalf,—and even for his fraud in doing so,—for in that case the servant is the employer's accredited representative, and the public are invited to deal with him on the master's implied assurance that they may safely do so. But between the employer and a person run down on the public street by a careless coachman there is no legal relation whatever, and as accidents often arise from the servant doing the very opposite of what he was told to do, or at least what he well knew his master desired him to do, the doctrine of agency is plainly an insufficient basis on which to rest this responsibility. Again, it is not because the mischief is done with the property of the master, or when the servant is acting for behoof of the master, for then he would be liable for the act of a contractor, which he is not. Yet, as the judges pointed out in the above case of *Baird v. Hamilton*, it is better that the rule should exist, rather than that the injured person should be confined to his remedy against the servant, for the effect undoubtedly would be to loosen a master's sense of responsibility in admitting persons into his employment, and in many cases, the servant being without means of his own, the injured person would be practically without redress (a). We conclude, therefore, that the rule is founded on what Chief Justice Shaw, of Massachusetts, has called "the great principle of social duty, that every person in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." In short, a man is answerable for his servant because he has been put in his place to do a certain class of acts, on the implied understanding that if harm arises to others from his carelessness

(a) *Farnell v. Boston, etc. Ry.*, 4 also Ld. Cranworth in *Bartonshill Met.* 49, 2 Journ. of Jurisp. 415. See *Coal Co. v. Reid*, 3 M'Q. 266, 283.

or incompetence, he shall make it good, just as if the act were his own.

A Servant—what?—It follows that in every case of master and servant affecting third parties two questions arise—Was he a servant? Was the act within the class of acts belonging to his office?

“In ascertaining,” says Mr. Justice Willes, “who is liable, we must look to the wrong-doer himself, or the first person in the ascending line, who is the employer, and has the control over the work; but we cannot go farther back and make the employer of that person responsible.” This was said in a case in which an accident happened, in the unloading of a vessel, to one of the stevedore’s men. The stevedore had contracted to discharge the cargo and employ his own labourers, but with right to the use of the ship’s winch and the services of the crew. The action, however, was brought, not against him, but the owners of the ship; and the Court held that the latter, having no control of the work, were not responsible (*a*). So, if one lends his servant to a contractor, he places him under his orders, and the contractor is alone liable for any wrongful act done by the servant while so employed.

A servant is one who works under the direction and control of another. He differs from a tradesman working in the pursuit of an independent calling and brought in to execute repairs, and from a contractor employed to execute a piece of work, who, so long as he fulfils his contract in regard to price, workmanship, and material, is entitled to do it in his own way. The difference is indicated by the distinction taken in the Roman law between the *locatio operis faciendi*—the letting of a piece of work to be done—and *locatio operarum*—the hiring of services (*b*). The mode of payment is immaterial;

(*a*) *Murray v. Currie*, L. R. 6 of Commons on Employers’ Liability C. P. 24. (4 May 1876) thus put the distinction:—

(*b*) Lord Bramwell in his evidence before the Committee of the House “If there is a contract between

it may be by wages ; by the piece ; by commission (*a*) ; or by nothing at all—like the driver of a coach or a waiter in an hotel, who take their chance of “tips” from travellers, and get no other remuneration (*b*). Nor is the power of discharging a workman conclusive, for this power is often reserved in a contract job to prevent the employment by the contractor of inefficient workmen (*c*). The agency through which the appointment was made is equally inconclusive as to who is master (*d*). These different points may all have some bearing on this question ; separately, however, they are inconclusive. To be in another’s employ is to be subject to his control, and therefore the only proper test is—who was entitled to intervene from time to time to see that the work was being properly done, and give orders which the servant was bound to obey ? This power of control does not, of course, require that the party should be there to exercise it. The master of a ship is the servant of the owners, although it is often impossible to communicate with them. Nor does it matter how he came to be under the other’s control, if such control *de facto* existed. It may have resulted from a contract to which the servant was no party, as when a ship is chartered the crew become the servants, not of the owners, but of the charterers (*e*) ; or from his being transferred by his own master to the control of another, as when horse and man are let out to drive the town water-carts under the orders of the town surveyor (*f*) ; or it may have resulted simply from the assumption of authority, as when the hirer of a carriage gives specific orders to the

them so that the person doing the work or doing the act complained of has a right to say to the employer, ‘I will agree to do it, but I shall do it after my own fashion ; I shall begin the wall at this end and not at the other ;’ there the relation of master and servant does not exist, and the employer is not liable. But if the employer has a right to say to the person employed, ‘You shall do it as I direct you to do it ;’ there the

law of master and servant applies, and the master is responsible.”

(*a*) *R. v. Macdonald*, 31 L. J. M. C. 67.

(*b*) *R. v. White*, 8 C. & P. 742.

(*c*) *Reedie v. L. & N. W.*, 4 Ex. 244.

(*d*) *Stone v. Cartwright*, 6 T. R. 411 ; *Wilket v. Boote*, 6 H. & N. 26.

(*e*) *Fenton v. Dublin St. Packet Co.*, 8 A. & E. 835.

(*f*) *Jones v. Corp. Liverpool*, 14 Q. B. D. 890.

driver, and assumes control of the driving (*a*). But when the control does not exist *de facto* or *de jure*, there is no responsibility. A contractor, for example, is himself an employer answerable for his men, not the employer of the contractor (*b*); still less is the latter answerable for the men employed by a sub-contractor (*c*). So, the hirer of a carriage driven by a coachman who is not the hirer's servant is not liable for the driver's negligence even when the driver is selected by himself (*d*). And a cabman hiring a cab and horse by the day, paying a fixed sum, is not the servant of the owner (*e*).

The rule which exempts an employer from the consequences of the contractor's negligence in executing a work lawful in itself, and which if carefully performed would have occasioned no damage to another, is subject to these limitations. (1) When any duty is imposed on a person, he remains responsible for its due execution, and it is no answer for him to say that he engaged a contractor to do it for him (*f*). (2) When the work is of a hazardous nature, the employer undertakes it at his peril, and it is immaterial that he has entrusted it to a skilful contractor if, in point of fact, damage is the result (*g*). (3) When the work is unlawful, all the parties concerned, contractee as well as contractor, remain liable (*h*). And, lastly, when he retains control over the workmen and personally interferes with the work, he may be treated as a principal (*i*). This, however, does not mean that a man continues responsible for his contractor because he retains a right to inspect the work when it is in progress without exercising any control over the means or method of its execution. An example of this occurs when a building is erected under con-

(*a*) *M'Laughlin v. Pryor*, 4 Scott N. R. 655.

(*f*) *Pickard v. Smith*, 10 C. B. N. S. 470.

(*b*) *Daniel v. Met. Ry. Co.*, L. R. 5, E. & I. App. 45.

(*g*) *Bower v. Peate*, L. R. 1 Q. B. D. 321.

(*c*) *M'Lean v. Russell*, *sup.*

(*h*) *Ellis v. Sheffield Gas Co.*, 23

(*d*) *Quarman v. Barnet*, 6 M. & W. 499; *Laugher v. Pointer*, 5 B. & C. 547.

L. J. Q. B. 42; *Hole v. Sittingborne*, 30 L. J. Ex. 83.

(*e*) *Dalyell v. Tyrer*, 28 L. J. Q.

(*i*) *Burgess v. Gray*, 1 C. B.

B. 52.

578.

tract to the satisfaction of the architect or some one appointed in the employer's interest; the contractor alone remains responsible for the consequences of his negligence (*a*).

A licensing body, such as a pilotage authority, empowered to appoint and license pilots, does not hold the relation of employer to the persons so appointed. The pilot is a public official, to be paid by those who require his services according to a certain tariff, and is answerable for himself (*b*). But where a harbour authority kept a staff of men at weekly wages to bring ships into the harbour, they were held answerable for the fault of a pilot in running a vessel on a sand-bank (*c*).

Was the Servant's Act in the Line of his Duty?—The second question is—Was the act within the class of acts given him to do?

The first principle which is deducible from all the cases is that the master assumes the risk of everything done by the servant *in* the business committed to him. As principal, he must answer for what is done by the servant within the sphere of his duty for his behoof. The reason, says Lord Brougham, "why I am liable for what is done for me and under my orders by the man I employ, is that by employing him I set the whole thing in motion, and what he does being done for my benefit and under my direction, I am responsible for the consequences of doing it" (*d*). On this ground Lord Holt held a jeweller responsible for the *fraud* of his servant in selling a false jewel for a true one; and wherever the business implies the power of transacting so as to bind the master, it has been ruled that no sensible distinction can be drawn between the case of "fraud and the case of any other wrong" (*e*). In all these cases "it may be said that the master

(*a*) *Grey v. Pullen*, 5 B. & S. 970; *Pickard v. Smith*, *sup.*

(*b*) *Ogilvie v. Mags. of Edinburgh*, 1 S. 24.

(*c*) *Holman v. Irvine Harbour*, 4 R. 406.

(*d*) *Duncan v. Findlater*, 6 Cl. & F. 910.

(*e*) Per Willes, J., in *Berwick v. English J. S. Bank*, L. R. 2 Ex. 259; *Houldsworth v. City of Glasgow Bank*, 5 App. Ca. 317.

had not authorized the act. It is true that he had not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the master to place him in" (a).

A master, however, is not liable for the act of his servant done outside of his employment. A shopman sent with a van laden with goods for delivery took the reins, owing to the drunken condition of the driver, and negligently ran down a man on the street; he was held liable personally for his faulty driving, but not the employer, who had never authorized him to drive (b). So, where a lad in driving off a horse which had strayed into his master's field mounted it and rode it home with such violence and cruelty that it was seriously injured, the master, in the absence of any proof that he had countenanced the boy's act, was held not liable (c). A man in charge of a canal barge having volunteered at the request of another bargee to assist him through a lock, with the result that the latter was drowned, the employer was held not liable, for the man in fault was not employed to navigate any vessel but his own (d). And where complaint was made that a gamekeeper in the service of the defender had fired at and killed the pursuer's dog, the action was dismissed, as a gamekeeper had no implied authority to shoot dogs or any other illegal act (e).

Under the law of contract, when we have a particular agent employed by a principal to perform a particular piece of business for him, he must keep within the instructions given for the particular occasion, and an act beyond them is not binding on the principal (f). But in a case of personal

(a) *Berwick, sup.*; *Mackay v. Commercial Bank*, L. R. 5 P. C. 53.
 412; *Swire v. Francis*, L. R. 3 App. Ca. 106.

(d) *Gallacher v. Burrell*, 11 R.

(e) *Wardrop v. Hamilton*, 3 R. 876.

(b) *Martin v. Ward*, 14 R. 814.

(f) *Morrison v. Statter*, 12 R.

(c) *Dalrymple v. M'Gill*, Hume 1152.

injury it is immaterial whether the servant obeyed or disobeyed his instructions, if what was done was done within the scope of his authority, and not for some personal object of his own. For example, a driver in taking home his master's horses may go a roundabout way to the stable ; still he is engaged on his master's business, although not in the strictest and most convenient manner. But if, after the business of the day is over, he takes out the horses to call on a friend of his own, he is doing something which he is not employed to do at all, and the master would not be responsible if he happened to run over some one in the course of the journey (*a*). So when a carpenter in lighting his pipe set fire to the premises (*b*) ; and a clerk, entering a room to which he had no right of access, negligently left the lavatory tap running, and so caused damage to another tenant, the masters were held not liable (*c*). But, on the other hand, where carters were allowed an hour for dinner, but were not permitted to go home and dine, and one of them did so, leaving his horse unattended, which ran away and caused damage, the master was held answerable. The man had a general authority to take charge of the horse and cart during the day, and when he left it unattended, in violation of his instructions, it was rightly found by the jury that he was acting within the scope of that authority (*d*).

It is sometimes said that the master will not be liable for an act of his servant prompted by malice ; but all the cases relating to wilful or malicious acts will be found to rest on the fact that the act was outside the servant's province ; and although evidence that the servant was influenced by temper or personal spite may help to this conclusion, it is now fixed that malice and wantonness will not defeat responsibility if the thing done was merely a *mode* of doing what the servant was employed to do.

(*a*) *Storey v. Ashton*, L. R. 4 Q. B. 476.

(*b*) *Williams v. Jones*, 33 L. J. Ex. 297.

(*c*) *Stevens v. Woodward*, L. R. 6 Q. B. D. 318.

(*d*) *Whatman v. Pearson*, L. R. 3 C. P. 422.

Suppose, for instance, two rival omnibuses are racing, and one cuts in before the other to bar its progress, the driver is guilty of an illegal act, but it is not for the employer to argue that he had expressly forbidden his drivers to do anything of the kind (*a*). In a case of this kind the jury were directed that if the driver acted in the supposed interest of his employers as against a rival in the business, the employer was answerable; but if only for some purpose of his own, the employer was not answerable. This was approved by the Court above, for the driver was employed not only to drive the omnibus, but to get as much money as he could for his master in competition with the other omnibuses running on the same road; and what he did was not inconsistent with employment, but rather in furtherance of one object of it—to get before the rival omnibus.

Different cases have arisen where a servant has been guilty of excess of authority under a mistaken execution of his office. A guard, authorized to remove an offensive passenger, binds the company by his mode of doing so. He has to determine for himself when a passenger's conduct renders his removal necessary; and so, if he uses needless violence in effecting his object, his employer must answer for it (*b*). When the authority is once established, no directions as to how it should be executed will exonerate the master. Where a passenger complained that he had been violently pulled from the carriage in which he had taken his seat, by a railway porter under the erroneous belief that he was in the wrong train,—the company disclaimed the act, and pleaded that the offender had acted in violation of the printed rules with which porters were furnished. It was proved, however, that

(*a*) *Limpus v. London Gen. Omnibus Co.*, 32 L. J. Ex. 34 (1862); *Fraser v. Younger*, 5 M. 861. An accident in a mash-house in a brewery which befell a girl who had been admitted by the man in charge, against the express orders of the employer. Lord Kinloch's direc-

tion, "that his act in allowing the deceased to come into the mash-house would not affect the defenders if it was in contravention of a direct order of the defenders," held to be bad in law.

(*b*) *Seymour v. Greenwood*, 30 L. J. Ex. 327.

it was the duty of the porters to prevent passengers going by the wrong train as far as they could do so; and although the porter, acting in a stupid, blundering manner, had pulled the plaintiff out of the right one, this was a mere abuse of his authority, for which the company was responsible (a).

In an American case, the conductor of a railway train, while the train was going at the rate of ten miles an hour, kicked off a small boy, who had, for the purpose of stealing a ride, seated himself on the platform of the rear car. It was admitted that the conductor was authorized to remove persons who refused to pay their fare or were disorderly; but it was urged that he had been guilty of such an abuse of his power that the company ought not to be held responsible for it. The Court said: "Assuming the case made by the plaintiff, that the act (of kicking him from the car) was flagrant, reckless, and illegal, the point is, was it within the scope of the employment? The removal of trespassers from the cars was, as we hold, within the implied authority of the defendant's servants on the train. The fact that they acted illegally does not exonerate the defendant. . . . No doubt the kicking of the boy off the car was not only a wrong to the plaintiff, but was a violation of the duty which the train servants owed to the defendant, to exercise proper care in the authority confided to them; but in most cases where the master has been held liable for the acts of the servant, the tortuous act was a breach of the servant's duty. In this case authority to remove the plaintiff from the cars was vested in the defendant's servants. The wrong consisted in the *time* and *mode* of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own" (b).

Many cases have occurred as to the power of station-masters, inspectors, and ticket collectors to give railway

(a) *Bayley v. Manch. Ry.*, L. R. Co., 41 Am. L. Rep. 397; and see 8 C. P. 148. other American cases, *ib.* vol. lx. p.

(b) *Huffman v. N. Y. Cent. Ry.* 880.

passengers into custody on various pretexts (*a*). These cases were recently reviewed in the Privy Council, and the result of them was stated to be, "that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer unless he had the power to apprehend offenders promptly on the spot" (*b*). Railway companies have accordingly been held liable for wrongful arrests made by officers of the company; but the conductor of a tramway car is within the limits of his powers in giving a passenger into custody who declines to pay his fare and refuses to give his name (*c*); and a passenger who claims the right to travel by a train to which his ticket is inapplicable, may be summarily ejected, if the company's bye-laws authorize such a proceeding (*d*).

Where an action of damages was brought for the injury caused by a horse being put in a stable while labouring under an infectious disease, it was not disputed that if the man had notice of the disease his knowledge was sufficient to affect the master; and generally, whenever knowledge requires to be established, it is enough to bind the employer that it is brought home to the servant authorized to act for him in the particular matter. The above case also illustrates how a servant, sent on a particular errand, has authority to do everything necessary for the due execution of his commission. He was conveying a horse to market at such a distance as obliged him to stable by the way. It was pleaded that the servant, in concealing from his master the fact that the horse was affected with glanders, had been guilty of a tortuous act, for which the latter was not answerable; but the Court held that, as

(*a*) See *Allan v. L. & S.-W. Ry.*, L. R. 6 Q. B. 65 (ticket clerk); *Edwards v. L. & N.-W. Ry.*, L. R. 5 C. P. 445 (foreman porter); *Walker v. S.-E. Ry.*, L. R. 5 C. P. 640 (constable); *Poulton v. L. & S.-W. Ry.*, L. R. 2 Q. B. 534 (station-master). Acts all *ultra vires*.
 (*b*) *Bank of N. S. Wales v. Owston*, 4 App. Ca. 270.
 (*c*) *Apthorpe v. Edin. Street Tramways*, 10 R. 344.
 (*d*) *Menzies v. Highland Ry.*, 5 R. 887.

the horse was being taken to the fair by the master's orders, the master was liable for all that happened on the journey through the fault of his servant. In giving judgment, Lord Ivory referred to a case decided by Mr. Jamieson as arbiter, where a house had been burned down by the cook sending up lighted straw to clean the chimney. The distinction which the arbiter took was, that if she had set fire to the chimney by letting some dripping fall on the live coals, the master would have been liable, for she would have been within her proper employment as cook. But not when she was trying to sweep the chimney—a thing which she had not been hired to do, and which was beyond the limits of her functions (*a*).

To whom is Master responsible?—The question remains, to whom is the master responsible, when he, being blameless himself, the fault causing the injury is the fault of a servant acting within the scope of his duty? Only to members of the public, with whom the master has no contract, and who are, in fact, in the position of a third party or a stranger at the time of the accident. If it be asked, who is this third party? Lord Gifford replies, that the only answer which can be given is this: "Where a person who voluntarily placed himself in such a relation to the master, or to the establishment or organization carried on by the master, that he must have known that he was exposed to the risk of the negligence of servants, then he can no longer be held a stranger or a third party, and action against the master will be denied" (*b*). He proceeds to mention cases by way of illustration. The foot-passenger injured by a coachman is a stranger—not the friend or acquaintance who has accepted a drive, nor the guest who, while partaking of one's hospitality, is injured by the carelessness of the butler, nor indeed any member of the family. So, if an accident happens when cattle are being delivered at a railway station with the help of the railway

(*a*) *Baird v. Graham*, 14 D. 615; (*b*) *Woodhead v. Gartness Mineral Mackenzie v. M'Leod*, 10 Bing. Co., 4 R. 469, 505; *Wingate v. Monkland Iron Co.*, 12 R. 91.

servants, the man in charge of the cattle, whether owner or owner's servant, is a stranger to the company, and may recover for the injury he sustains through the fault of the company (a).

Criminal Responsibility.—No one is liable to be punished for the criminal act of another, unless he has been art and part in its commission. If a coachman by furious driving were to cause the death of another, the master will be liable in damages, but not to a criminal prosecution. *Actus non facit reum nisi mens sit rea*; the employer is not punishable along with the delinquent, unless he either incited to or assisted in the perpetration of the wrong; and this holds of every act which is truly criminal in its character. But under the statutes relating to the revenue, licensing, gambling, nuisance, and police measures generally, an innocent master may be convicted and fined for the servant's illegal act, even when it was done in his absence and contrary to express orders. The reason is, that a master is bound to see that his business is conducted in accordance with the statutes which have been passed for its regulation; and although the object is penal, the action brought for the recovery of the penalty is a civil suit, to be decided on principles that rule civil liability. Were it otherwise, the Acts would be nugatory, as the offending employer would always throw the blame on his workman. For example, under the Smuggling Act (b), an employer has been held liable for the penalties incurred by his servant in selling smuggled goods; for although the master was absent at the time, the sale was made within the scope of the servant's employment, and was in effect the master's act (c). By the Excise statutes, a penalty is imposed for the improper use of "permits;" and a distiller's clerk, having sold a cask of whisky to an unlicensed person, and delivered it with a permit obtained in another name, the firm were prosecuted for the penalties. The judge directed the jury, that unless

(a) *Wyllie v. Caled. Ry. Co.*, 9 M. 463; *Calder v. Caled. Ry. Co.*, 9 M. 833. (b) 57 Geo. III. c. 123, § 13. (c) *Att.-Gen. v. Seddon*, 1 Cr. & J. 220.

they were satisfied that the defendants, or either of them, were in the personal knowledge of the facts done, they should find for them. But this was held to be erroneous; for the statute was so expressed as to make the act of the servant, if within the province of his employment, and amounting to the statutory offence, binding on the master, so as to render him subject to the penalty (*a*). A different case, however, is presented when the act which the servant has committed in breach of the statute does not fall within the line of his employment; for no one can act through the agency of another, unless the agent be doing something within the authority which he holds from the principal; therefore an information against brewers for retailing beer without a licence was held to be rightly dismissed when the only evidence was, that the man in charge of the brewer's cart, who had no power to sell, but only to receive orders and deliver the beer which had been previously ordered, had sold a bottle on the highway. This was held to be without the knowledge of the defendants, and not being within the scope of his employment, they were not liable for the servant's act (*b*).

In the event of a nuisance arising under the statutes relating to the consumption of smoke, the occupier is liable, although no one may have been in fault but the person in charge of the furnaces. The fact that the nuisance has occurred on the premises renders the employer liable, although it may have been solely due to the carelessness of his servant in not obeying his instructions (*c*). And under the Licensing Acts, prohibiting gambling on the premises and the sale of intoxicating liquor in certain circumstances, proof of knowledge on the part of the publican is not necessary to support a conviction, if it was the act of a person in charge at the time,

(*a*) *Att.-Gen. v. Grant*, 15 D. 980. clubmaster in selling, contrary to

(*b*) *Queen v. Gilroys*, 4 M. 656; orders, liquor to a person not a
see also *Newman v. Jones*, 17 Q. B. D. member.

182, where the trustees of a club. (*c*) *Barnes v. Akroyd*, L. R. 7
were held not liable for the act of a Q. B. 474.

or done with his connivance. When, in fact, a penalty is imposed for "permitting," "suffering" something to be done, the meaning is that the holder of the licence shall prevent that which the Act prohibits, otherwise the penalty is due. It is for the justices to say if the master is free from blame in what the servant did (*a*). He has been found liable for the following acts of his shopmen or assistants: for selling drink in prohibited hours (*b*); or to a drunken man (*c*); or to a constable on duty (*d*); also for sending diseased animals without licence, contrary to the Act (*e*); for rubbish being thrown into a navigable river without his knowledge (*f*); for suffering gambling on the premises (the owner shutting his eyes to what was going on) (*g*); and for unsound meat being on his premises for the purpose of sale, the master not knowing that it was there, or that it was unsound (*h*). "There can be no question," says Lord Deas, "that in cases of this kind (a public-house case) the occupier is responsible for his servant who is attending in the room where parties (of evil fame) are congregated (contrary to 25 & 26 Vict. c. 35); and the question really is, what the servant really knew, or reasonably ought to have known, about the parties" (*i*).

SECTION II.—RESPONSIBILITY TO THE SERVANT.

An employer must in all cases indemnify his employee for losses caused by the employer's own want of care; but not for losses resulting from the ordinary risks of the business; nor in consequence of the negligence of another person employed by the same employer in the same organization of labour,

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| (<i>a</i>) <i>Seymour v. Hant</i> , 12 Q. B. D. 360. | (<i>f</i>) <i>R. v. Stephen</i> , L. R. 1 Q. B. 702. |
| (<i>b</i>) <i>Copley v. Barton</i> , L. R. 5 C. P. 489. | (<i>g</i>) <i>Besley v. Davies</i> , 1 Q. B. D. 89; <i>Redgate v. Haynes</i> , <i>ib.</i> ; <i>Bond v. Evans</i> , 21 Q. B. D. 249. |
| (<i>c</i>) <i>Lundy v. Le Cocq</i> , L. R. 13 Q. B. D. 207. | (<i>h</i>) <i>Dickson v. Linton</i> , 15 R. (Just.) 76. |
| (<i>d</i>) <i>Mullins v. Collins</i> , L. R. 9 Q. B. 292. | (<i>i</i>) <i>Maxwell v. Malcolm</i> , 7 R. (Just.) 5. But see <i>Greenhill v. Stirling</i> , 12 R. (Just.) 37. |
| (<i>e</i>) <i>Nichols v. Hall</i> , L. R. 8 C. P. 322. | |

unless it was fault on the part of the employer to have such a person in his employment.

This proposition rests on the fact that a master's responsibility to a workman for injuries sustained in his service stands on a different principle from his responsibility to the public. In a question with the public the risk is his alone, whether he conducts the business himself or through the instrumentality of others. If he keeps a carriage, and through the carelessness of his driver runs over a passenger on the highway, he is liable on proof of the negligence; but if the person injured is the footman who rides behind, a different question arises; for when the footman entered his service it must be taken that he had in view the possibility of such an occurrence. Every man is paid according to the hazardous nature of the occupation; the obligation of the master in such a case must be founded on the terms, express or implied, of the contract between them; and when the nature of the contract is examined, it will be seen that the position of the parties is this. The workman takes upon himself the risk of accidents, subject to the condition that the master on his part will do what he can to prevent them as far as possible. He does not guarantee that no accidents will occur, but he binds himself to do certain things; and any breach of this obligation is fault on the part of the master, which entitles the servant to damages. In the first place, the workman has to work along with others; and as the carelessness of one of them may endanger the safety of all, the master engages to use due diligence in the selection of his workmen, so as to prevent unskilful and drunken persons getting into his service. In the next place, in a great manufacturing country such as ours, the system under which the work is carried on, and the regulations laid down for the common safety, are the fruit of much anxious thought and experience, and the workman engages himself on the assumption that in this matter due attention will be paid by the employer also. And, lastly, the master impliedly undertakes that the premises are reasonably safe, and that the plant, machinery, and tools—the means and

appliances with which the workman is furnished to render the stipulated service—shall be, as far as can be seen and known, good and proper of their kind.

When a servant is injured through the negligence of a co-servant, the actual wrong-doer is of course answerable like any other person. A man is not the less liable for a wrongful act because it is done by the order or authority of another (*a*). The circumstance that both are working at the time under one and the same master, in no way affects the rights of the one against the other for his personal fault. In like manner, when personal fault can be established against the master, as, for instance, when he himself takes the work in hand, and the workman is injured in the execution of orders given by the employer himself and carried out under his own eye, he will have to answer like any other individual—his liability for his own default is the same whether he is master or not. But this is not the kind of liability now under consideration, and which has been aptly termed by the Lord President the master's "secondary responsibility,"—the liability that attaches to the master when personally free from blame,—which grows out of the simple fact that the workman was one of a number, all working under the same employer, and subject to the superintendence of others.

History of the Doctrine of Co-service.—The doctrine that a master—provided he is free from negligence in choosing the men employed and in furnishing adequate means and materials—incurs no responsibility to a workman injured in his service, was first enunciated by the Supreme Court of South Carolina in the year 1841 (*b*); and in the following year a like judgment was pronounced by the Supreme Court of Massachusetts, in a case which has now become the classical authority on the subject — *Farwell v. Boston & Worcester Ry. Co.* (*c*). The two Courts, however, reached the same conclusion by a some-

(*a*) *M'Kenzie v. Goldie*, 4 M. 277. (*c*) 4 Met. 49; reported also in

(*b*) *Murray v. S. Carolina R. R.* 2 Journal of Jurisprudence, 415.
Co., 1 M'Mulin 385.

what different process. In the South Carolina case, the person in fault was an engine-driver, and the person injured the fireman. The Court held that, considering that both were engaged for the attainment of a common object—the regular movement of the train to its destination—there was a joint undertaking by both engineer and fireman, as well as by all the servants of the company towards each other, for the due performance of their respective duties; but they were not liable to the company for each other, nor was the company liable to one for the conduct of another; and, as a general rule, where there was no fault in the employer, he was only liable to his servants for their wages.

The Massachusetts case was also a railway accident case, an engine-driver having been injured by the fault of a pointsman. The Court also held the company to be exempt from liability, not on the ground of the South Carolina decision, that *all* the servants were jointly bound to look after the general safety, but because, as between them and the master, each took the risk of his fellow-workman's negligence. The engine-driver, it was said, in entering the service of the company agreed by implication to take upon himself the natural and ordinary risks and perils incident to the performance of his service, including another workman's carelessness; and that the master did not engage to indemnify him against the negligence of any one but himself. A stranger injured by his servant's negligence he must indemnify, because he is a stranger; but in a question with his employer, the workman was no stranger, but one with whom there already subsisted a defined legal relation, and whose rights are regulated by contract, express or implied. In the State in which this judgment was given, the common law which prevails is the English Common Law, which the English Puritans carried with them across the ocean; and the decision was subsequently adopted by the House of Lords, as placing this important branch of the common law of both England and Scotland on its true basis.

There had been an earlier case, in which the question had

been mooted in the English Court of Exchequer (*a*); but the problem was not seriously faced and judicially solved in England till the year 1850, when the case of *Hutcherson v. York, Newcastle, & Berwick Ry.* came before the same Court (*b*). The non-liability of the employer to a workman for an injury caused by a fellow-workman was then affirmed; and in the same year it was held that a master builder was not responsible for the death of a bricklayer through the fall of a scaffold which had been insufficiently put together by other workmen (*c*).

On the strength of these English cases, the Second Division of the Court of Session was asked to decide the question in the same way in the year 1852, in the case of *Dixon v. Rankin* (*d*). A squad of workmen were engaged in raising coals from a pit by means of a "crab"—an instrument consisting of an upright axle with horizontal spokes. When weighted with a heavy load, the foreman, to keep it temporarily in position, ordered one of the spokes to be tied to the stump of a tree by means of a rope obviously insufficient to sustain so great a weight. The rope snapped; the arms flew round; and one of the men, who was standing leaning on the crab, was dashed to the ground and killed. The Court decided that what had been affirmed to be the law of England was not the law of Scotland. "The justice of the thing," said Lord Cockburn, "is exactly the opposite. . . . I can conceive some reason for exempting the employer altogether from liability, but not one for exempting him only, when those who act for him injure one of themselves; it rather seems to me that these are the very persons who have the strongest claim upon him for reparation." The Lord Justice-Clerk (Hope) founded strongly on the circumstance, that the man in fault on the occasion was a foreman in a position of superintendence, and observed—"that in the contract of service in Scotland the servant undertakes no risk which the

(*a*) *Priestley v. Fowler*, 3 M. & W.
1, decided in 1837.
(*b*) 5 Exch. 343.

(*c*) *Wigmore v. Jay*, 5 Ex. 354.
(*d*) 14 D. 420.

presence of the master, or, in his absence, others acting for him, could have prevented."

The distinction here hinted at was more clearly seen and appreciated in the subsequent controversy. In the original American case, the Court had pointed out that when several persons join in one common enterprise or undertaking, and the safety of all depends upon the care and skill with which every man shall perform his appropriate duty, each as an observer of the others can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole may require. By this means, it was said, the safety of each would be much more effectually secured than could be done by a resort to the common employer for an indemnity in case of loss by the negligence of each other. But no work can be carried on without superintendence of some kind, which the master either supplies himself or through a foreman acting for him; and when it was urged that the servant should be held to undertake not only the risk as between himself and another workman of the same rank, but also of the insufficiency of the superintendence which it was the duty of the master to supply, the proposition was evidently going beyond what the true nature of the relation really warranted. In 1858 the general question came before the House of Lords in what is known as the first Bartonshill case (*a*), with the result that the English and American view was affirmed. Here, however, the man in fault was the man in charge of the engine, whose duty it was to raise and lower the miners, one of whom had been killed; and if the rule applied at all, no question could arise as to their being fellow-workmen. When, therefore, the Courts in Scotland accepted the judgment as finally settling the general doctrine, they for some years resolutely declined to exonerate the master when the person in fault occupied a position of superintendence. In one case they had occasion to consider whether an employer would get rid of the duty of providing

(*a*) *Bartonshill Coal Co. v. Reid*, 17 D. 1017, 3 M'G. 206.

for his workmen's safety—in the due ventilation of the mine—by handing it over to a contractor; and Lord Anderson, in a very able judgment, pointed out how this could not be (a). It would be, said he, subversive of the whole benefit of the principle that the workman shall look to the master, to allow the master to devolve the duty on a stranger. It was quite clear that the law imposed on the defenders an obligation to take all due precautions, by sufficient apparatus and otherwise, for protecting the workmen from explosions in the pit; and if this duty was neglected, the fact that he had devolved it on another was nothing. By no mere change in the mode of his operations could he shift the liability from himself as employer to others; he must be answerable for anything which was left undone, if it was his duty to see it done by himself or by others under him (b).

It is obvious that if the obligation of a master as regards the ventilation of the pit is such as to be incapable of devolution, except on the footing that his personal liability shall remain, the same should follow with respect to superintendence delegated to a foreman. By a foreman the judges in Scotland always understand a superior workman acting as the master's deputy during his absence, not a mere overlooker, like an underground manager (c). But so qualifying the phrase, they insisted on the distinction between the foreman and the men working under his orders. In *Brownlie v. Macaulay* (d), Lord Colonsay, then Lord President, observed: "The case of Bartonshill has not decided—nor do the dicta in it go the length of deciding—that if a person is placed in superintendence and authority and control over the others, he is to be regarded as a fellow-workman of those over whom he is so placed. I have great difficulty in arriving at the conclusion that he is a fellow-workman." And Lord Deas, in the same strain, remarked: "The question, whether a master is liable for his foreman, resolves into the question whether the

(a) *Baird v. Adie & Miller*, 16 D. 490.

(b) *Baird v. Adie*, *sup.*

(c) *Wright v. Roxburgh*, 2 M. 748.

(d) 22 D. 975.

foreman and the pursuers were collaborateurs in the sense of law. I think they were not. I think the foreman was *the master's representative delegated to act* for him in his absence, with power to give all orders which he could have given, and that when a master so delegates his powers and duties in matters affecting life and limb, he must be responsible for the acts and intromissions of his representative equally as for his own. I can find nothing in the English cases, when carefully looked into and rightly understood, contrary to this principle."

In the following year, in the case of *Derby v. Duncan* (a), the Lord President (McNeill), and in *Finnigan v. Peters* (b), the Lord Justice-Clerk (Inglis), animadverted on the injustice of holding that a master who took no superintendence of his work was to be under no responsibility for his foreman or overseer. "I know of no authority," said the latter, "for such a doctrine of law either in England or Scotland." And in *Somerville v. Gray* (c), the Lord President again said: "I think there is room for a distinction among different classes of servants acting under the same master; the House of Lords have not said there is not; the difficulty is where to draw the line of distinction."

In England some slight countenance was given to these views by the distinction which was taken by one eminent judge between a "deputy master" and an ordinary workman (d); but it never received much favour; and in the case of *Feltham v. England*, the judges of the Court of Queen's Bench decided (e) that, for the purpose of the rule, all workmen, of whatever rank or degree, stood on the same platform. They declined to recognise a foreman or manager as anything but simply a servant with a higher authority. In accordance with these views, the House of Lords in 1868, in the case of *Wilson v. Merry* (f), terminated the controversy by assoilzieing

(a) 23 D. 529.

(b) 23 D. 260.

(c) 1 M'Ph. 768.

(d) Per Byles, J., *Gallagher v. Piper*, 16 C. B. 669.

(e) L. R. 2 Q. B. 33.

(f) L. R. 1 Sc. App. 326.

the employers from the conclusions of an action of damages founded on a coal-pit accident, where negligence was charged against the underground manager, and the manager of the pit where the explosion occurred, as well as the general manager of the company, which had several pits. In the course of the judgment Lord Cairns remarked :—

I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not or is in any technical sense the fellow-workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred, the negligence has no doubt been the negligence of a fellow-workman ; but the case of the fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand on higher and broader grounds. . . . The master is not and cannot be liable to his servant, unless there be negligence on the part of the master himself in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial might be disastrous to his servants, for the master might be incompetent personally to perform the work ; at all events, a servant may choose for himself between serving a master who does and a master who does not attend in person to his business. What the master is, in my opinion, bound to his servant to do in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do ; and if the persons so selected are guilty of negligence, this is not the negligence of the master ; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen. As was said in the case of *Tarrant v. Webb*, negligence cannot exist if the master does his best to employ competent persons ; he cannot warrant the competency of his servants.

Some years after it fell to an Irish court of law to carry the above doctrine to its logical conclusion, by holding that there

was community of employment between the general traffic manager of a railway and one of the platelayers employed on the line (*a*). The result was thus reached, that, as regards public companies and corporations,—in these days of joint-stock enterprise the great employers of labour,—and where the ultimate responsibility rests on a fluctuating body of shareholders, who can only act through directors and general managers,—the unfortunate workman who may suffer in his person from a faulty system of management is absolutely without redress.

If we now go back for light on the question to the country from which the doctrine of co-service was originally derived, we find that the Supreme Court of the United States have recently applied to the doctrine the very same limitations for which the Scottish judges uniformly contended. The question which came before them for decision was whether a railway company was liable to one of their workmen for an injury caused by the negligence of the conductor of the train. In America the conductor is a much higher official than the English guard. He has the entire control of the train, and exercises a general authority over brakemen, engine-drivers, porters, and all other officials. The Court (by a majority) decided that such an official should be treated as the personal representative of the corporation, for whose negligence it was responsible to the subordinate officers. "There is," said the Court, "a clear distinction to be made in their relation to the common principal between the servants of the corporation, exercising no supervision over the others engaged with them in the same employment, and the agents of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence. . . . Such a distinction seems to us both reasonable and just. It will secure more care in the selection of the sub-agent, and thus give greater security to the servants engaged under him in an employment requiring the utmost

(*a*) *Conway v. The Belfast Railway Co.*, Irish Reports, 11 C. L. 345.

vigilance on their part, and at the same time prompt and unhesitating obedience to his orders" (a).

In the discussions which have taken place on this subject frequent use has been made of the expression "common employment"—a misleading phrase, because it suggests that the rule is confined to the case of two workmen working together under the same master,—while, as Lord Cairns observes in the passage already cited, it is merely an example of the application of the rule, not the rule itself, which is broader in its scope and rests on a higher principle. When two persons work side by side, they may be both held to take their chance, the one against the other, without looking to the master; and so in many departments of labour, where each of the men has his own appropriate function in the production of the general result, every one knows that although engaged in separate departments they are all engaged in a common employment. On a railway, the engine-driver and the signalman,—or the guard of the train and a platelayer on the line (b); in a mine, the man in charge of the engine and the miners whom he raises from the pit (c); at a railway terminus, a painter painting an engine-shed and the man moving trucks at the turning-table (d); on board a steamer, the third engineer and the first engineer (e); the man in charge of a barge and a man lowering and moving barrels in the warehouse (f); the certificated manager of a mine and the

(a) *Chicago, Milwaukie, & St. Paul v. Ross*, 112 U.S. 377.

To the same effect Lord Ardmillan observed in *Sneddon v. Mossend Iron Co.* (1876), 3 R. 868:—

"I understand how two men may be held to confide in each other and run the risk of injury in the common work, when engaged in felling one tree, or working at one wheel, or digging together in one pit; but when the rule releasing employers from liability is extended to the case of a manager who has charge of the work, and has authority given him

over the men, and who represents the master in the exercise of that authority, I find great difficulty in understanding the distinction."

(b) *Waller v. S.-E. Ry. Co.*, 32 L. J. Ex. 205.

(c) *Bartonshill Case*, *sup.*

(d) *Morgan v. Neath*, L. R. 1 Q. B. 149.

(e) *Searle v. Lindsay*, 11 C. B. N. S. 429.

(f) *Charles v. Taylor*, L. R. 3 C. P. D. 496, and *Lovell v. Howell*, 1 C. P. D. 161.

miners (*a*),—are instances which have been held to be proper cases of co-service. But other examples will be readily figured where the connection is more remote. A dairymaid bringing home milk from the farm is run down by the coachman; a clerk in a shipping office, sent on board a vessel to see the captain, stumbles through a hatchway left open by the mate; a ploughman at work on a piece of ground near a coal-pit is injured by the fault of the men in charge of the pit under the same master (*b*). In these and similar cases the test which falls to be applied is,—Did the servant in accepting his situation take upon himself the particular risk? Where two persons are employed in different departments of the same establishment, and the services of each will bring him to work in the same place and at the same time, so that the negligence of the one in his own occupation may injure the other in doing what he is bound to do, the master is not liable. Thus, as between the owners of a ship and the pilot whom they are compelled to employ, there is no implied contract that the pilot shall take upon himself the risk of injury from the crew; nor as between the owner of a mansion-house and those sent by a tradesman to repair it, is there any ground for holding that the workmen take upon themselves the risk of injuries caused by the negligence of his domestics. The principle which exempts the employer is not limited to the case of a fellow-servant. “It is the same in the case of a member of his family, of a friend who may be driving with the owner, or of any person who places himself by contract or otherwise voluntarily in such a relation to the master that he must be held to have taken upon himself the risks incident to his position. The rule of law thus depends on a principle of which the case of a fellow-servant is only one illustration. The risk in these cases remains where it fell—the owner being, of course, not guilty himself of fault” (*c*). It has accordingly been decided that the clerk of a firm of

(*a*) *Howells v. Landore Steel Company*, L. R. 10 Q. B. 62.

(*b*) *Wright v. Roxburgh*, 2 M. 748.

(*c*) Per Lord Young, *Wingate v. Monkland Iron Co.*, 12 R. 91.

mining engineers who was severely injured when making a periodical survey of a pit, through the negligence of a workman who had charge of the ventilation, had no claim against the owners of the pit (a); and when different departments of the work of a mine are let out to squads of workmen—all the men engaged in the mine, whether employed directly by the owners of the pit or by contractors and sub-contractors, are members of the same organization, and each takes the risk of accidental negligence on the part of the others (b). Where the contractor and his workmen are entirely independent of the employer, there is no duty on the part of the contractee to provide for their safety. If a man contracts for the sinking of a well, the owner of the land is under no obligation to attend to propping the sides of the shaft (c); and the owner or employer is equally exempt when there are several sets of workmen all at work at the same time, and the negligence is not his, but that of some one of the others. Thus, where the owner of a new building does the mason work himself and contracts with a joiner to do the joiner work, a joiner injured by one of the masons has no claim against the common employer (d). And when A., a workman in the employment of B., who had contracted to lay a cement flooring of a new building, was injured by a workman in the employment of C., who had contracted to execute the plumber work, it was held that C. was not responsible to A. for his workman's fault (e). These decisions, however, do not apply to the case of a tradesman called in to make repairs, who injured one of the ordinary servants of the establishment by his negligence. One of the employees of a railway company, who was injured when engaged in the ordinary course of his duty in a goods-shed by the fall of something from the roof, was found entitled to proceed against the master of a slater engaged in

(a) *Wingate, sup.*

(b) *Woodhead v. Gartness Mineral Co.*, 4 R. 469.

(c) *Robertson v. Russel*, 12 R. 634.

(d) The opposite was decided in *Gregory v. Hill*, 8 M. 282, but the case is overruled by *Woodhead*.

(e) *Maguire v. Russel*, 12 R. 1071.

repairing the roof, the accident being due to his negligence (*a*). So, when one railway company has running powers over the line of another company, the servants of the two railway companies are not fellow-servants (*b*), and the company to blame is liable in damages to the person injured as if he were a stranger.

Employers' Liability Act.—If the result finally attained by the judges, that no employer could ever be answerable to a workman for any one's negligence but his own, had been reached at a single step, the probability is that what was judicially declared to be the law would have been at once altered by a declaratory enactment. But the advance was gradual; the point to which the decisions were tending was not foreseen; and it was only in 1868, when the House of Lords solemnly affirmed (in *Wilson v. Merry's* case) that practically in an organization of labour everybody but the master was a fellow-servant, that the grave consequences of the doctrine became apparent, and gave rise to an agitation which ended in the Employers' Liability Act.

This Act, which was first passed in 1880 as a temporary and experimental measure, has now been continued in an unamended form. It is entitled an "Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service;" and the principal amendment is that a master, when sued by his servant for injuries sustained in the service, shall no longer be at liberty to plead that the negligence causing the accident was the negligence of a co-servant, if (1) the person to blame was a foreman or other person exercising superintendence; or (2) if the person injured was at the time under the orders of another workman, and the injury was due to his having given obedience to that person's orders.

Negligence of Superintendent.—The main object of the

(*a*) *Gorman v. Morison & Son*, 12 D. 1073.

(*b*) *Calder v. Cal. Ry.*, 9 M. 833; *Adams v. G. & S.-W. Ry.*, 3 R. 215.

statute is to repeal the effect of the decision of the House of Lords in *Wilson v. Merry & Cunninghame*, and to restore the common law to the position in which it would have been brought by the Scottish judges, if they had been allowed to have their own way. It recognises the distinction on which they insisted, between a fellow-workman and a superior workman exercising on behalf of a master the duty of superintendence. It assumes that no master fulfils his duty to those who are in his employment by leaving his work to take care of itself. Either he must superintend himself or employ some competent person to do so in his absence, who will stand between him and his workmen as his deputy or representative.

This does not mean the principal man of a squad working like the rest, but taking a general charge of the operation (which is the object of the next clause), but a superior workman "whose sole or principal duty" is superintendence over the others, such as is exercised by a foreman, or a person in a like position to a foreman. He may casually take a hand in the work, provided he be not ordinarily engaged in manual labour; but when so engaged he is simply a fellow-workman; therefore the negligence which binds the master is negligence which has occurred in the exercise of superintendence. Thus it has been held that a man whose duty it was to give directions as to the working of a steam crane, while he himself held and guided the guy-rope, was not guilty of negligence in superintendence conducing to the accident by neglecting to use the guy-rope, and the employer was not responsible (*a*).

Overlooker giving wrong Order.—The second case in which the statute attaches liability to the employer is when the accident resulted from an order given by some one, who, although not entrusted with superintendence as his main or principal duty, was still entitled to give the order. The class

(c) *Schaffers v. Gen. Steam Nav. v. Hay*, 9 R. 425; *Osborne v. Jack-Co.*, L. R. 10 Q. B. D. 356; *M'Manuson*, L. R. 11 Q. B. D. 619.

of workman contemplated is a ganger, or head of a squad of workmen (*a*),—a workman engaged in a joint operation with another, yet so far superior that it is for him to say when certain acts are to be done. It must be shown that “conforming to an order” which ought not to have been given was the efficient cause of the injury. “This means,” says Lord Young, “that the relative position of the parties was such that the one owed obedience to the other, and that the order was such that it could not be declined without contumacy.” An illustrative case is that of a carman and boy sent out to deliver goods, where the boy proceeded to act as he had done on other occasions, the carman making no objection (*b*). As it was admitted that if he had told him to do anything he would have expected him to do it, the employer was found answerable for the injury which happened to the boy from the careless mode in which the articles (large iron window-frames) were untied before being taken from the cart (*c*).

It may be sometimes contended that the order was so obviously unsafe that the servant injured should have refused to obey. When such a question was raised in a case under the old law, the Court said it was for the jury to decide. The mother of an apprentice brought an action against the master, on the allegation that her son had died in consequence of endeavouring to lift a heavy log of wood in obedience to the orders of a foreman. It was pleaded that the boy should have refused to obey; but the Court said the jury would deal with the question in the light of the fact that the person injured was a lad, and the order given was by a workman who had better knowledge and skill, and whose duty it was to teach him, among other things, how to avoid danger. Probably it may now be reasonably contended that, under the new law, whether the man in fault was a foreman or not, if the order

(*a*) *Dolan v. Anderson & Lyall*, 12 R. 804; *Kelland v. Rooke*, L. R. 19 Q. B. D. 585; *Howard v. Bennett*, W. N. 1888, 250. (*b*) *M'Manus v. Hay*, 9 R. 425. (*c*) *Millward v. Midland Ry.*, 14 Q. B. D. 68.

was in fact within his province, the workman was entitled to surrender his judgment to him, and the master is responsible for the consequences (a).

Contractor and Contractee.—We have already seen that the workmen hired by a contractor have no claim as regards their own safety on anybody but their own master. The employer of the contractor owes them no duty, because between him and them the relation of master and servant does not subsist (b). The Act makes no change on this rule of the common law. But when it is part of the contract that the contractee shall supply machinery or plant for the use of the men engaged in the work, and by reason of its defective condition or arrangement personal injury is caused to a workman employed by the contractor or by any sub-contractor owing to the negligence of the contractee or some person entrusted with the duty of seeing that such condition or arrangement was proper, the contractee is liable in compensation. In building contracts also, where the joiner is usually taken bound to supply the scaffolding for the masons, etc., the joiner has been held liable for an injury sustained by one of the mason's men, in consequence of its having been negligently put up (c).

The exemption of the master from responsibility under the doctrine of co-service supposes that he on his part has secured proper servants and proper machinery for the conduct of the business in which the workman is to be engaged. His obligation in this respect is not of the nature of a warranty binding him absolutely to see that they are good and sufficient of their kind. He is only bound to use all reasonable care and caution in furnishing for use in his work safe and sound and suitable implements, appliances, and machinery, and keep the same in good repair. Any breach of duty in this respect is *culpa* on the part of the master, and this *culpa* has to be considered in connection with *men, plant, premises, and system*.

(a) *M'Millan v. M'Millan*, 23 D. 1080. (c) But not when it was not for his use. *Nicolson v. M'Andrew*, 15 R. 854.
(b) *Robertson v. Russel*, 12 R. 634.

In the Selection of competent Workmen.—The master's first duty is to employ an adequate staff of competent servants to do the work safely. Where an accident was partly attributed to an incompetent waggon-driver, who was said to be known to the employer to be a man of careless and drunken habits, unfit for his duty, the relevancy was sustained (*a*), because the master's knowledge was clearly averred. The burden of proof is on the pursuer; but he is not bound to do more than raise a reasonable presumption that the master knew, or, in the exercise of reasonable care, might have known, that the servants were incompetent at the time of engaging them, or subsequently became so. The same holds when the staff is insufficient in numbers; and for the consequences of an accident due to this cause, the servant is entitled to recover, unless he joined the work knowing that it was carried on short-handed, and voluntarily accepted the risk (*b*). In this case, however, it must be shown that the danger incident to an imperfect equipment was fully present to his mind before it can be held that he assumed the risk and waived his right to go against the master for his neglect of duty. Such an inference may be justified by his continuing in the work a certain length of time, knowing that the staff was too small and yet making no complaint; while for a deficiency temporary or accidental the master would remain responsible. Thus in an American case, where a train was ordered to proceed on a journey with one less than the usual number of brakemen, and there was evidence to show that if the absent person had been present, he, with the others, could have controlled the momentum of the train and prevented an accident, the company being guilty of negligence in sending the train forward short-handed, were held to have assumed the risk of all the consequences which might result to the train or the servants sent out with it (*c*).

(*a*) *Donald v. Brand*, 24 D. 295.

(*c*) *Flike v. Bostony & Albany R.*

(*b*) *Skipv v. East Co. Ry.*, 9 Exch.

R. Co., 53 N. Y. 549; *Wood's M. & 223*; *Story's Agency*, note by Green, S. 773.

§ 453a.

Plant.—The Act concisely expresses the rule of the common law, when it declares that the master shall be liable where personal injury is caused to the workman “by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer,” and the defect or the failure to discover or remedy the defect arose from the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition (*a*).

The word “plant” is not confined to inanimate things. It may include a horse, which if vicious and troublesome is defective within the Act. Defect has been defined as anything which renders the plant unfit for the use for which it is intended when used in a reasonable way and with reasonable care (*b*). An accident caused by a bogey striking against a bar which had been negligently suffered to project over a roadway formed of iron plates was not due to any defect in the condition of the “way,” which if kept free from obstruction was safe enough. A defect in the way, it was said, meant a hole in the road, or something faulty in the subject, not a temporary obstruction, interfering, till removed, with its safe use (*c*). It is, however, the duty of the employer to see to the safety of the way, both as regards its “condition” and “arrangement;” and to avert danger it may be as necessary to clear it of obstructions as to remedy any structural defects, and this may be fault of “superintendence” entailing liability (*d*).

A machine, sufficient of its kind, may be applied to a purpose beyond its strength. When a crane, used for lifting old rails by tearing them off the sleepers to which they were nailed, gave way in the course of the operation and injured

(*a*) In 43 & 44 Vict. c. 42, secs. 1 and 2.

(*c*) *M'Giffin v. Palmer's Ship-building Co.*, L. R. 10 Q. S. 5.

(*b*) *Yarmouth v. France*, L. R. 19 Q. B. D. 647; *Haston v. Ed. St. Tramways Co.*, 14 R. 621; *Fraser v. Hood*, 15 R. 178.

(*d*) *Morris v. Monkland Ry. Co.*, 19 D. 360.

one of the workmen, the employer was held answerable (a). We cannot judge of the adequacy of any apparatus, except in relation to the particular purpose which it was intended to serve (b). Therefore, where a ladder gave way which had been used for the support of a scaffold, the Court held the employer liable, on a finding by the jury that it was insufficient for the purposes for which it was being used at the time of the accident (c).

Under the Act of 1880, a wall in course of construction was held to be not used in, or connected with, the business of the employer; as "ways, works," etc., mean existing and completed works (d).

While it is incumbent on an employer to take care that the machinery which he provides for his workmen shall not be faulty, it is not enough to prove simply that the instrument gave way and did the injury, for this may have been due to a latent defect, and both master and servant run the risk of these. To support the action it is not only necessary to show the insufficiency, but that this insufficiency arose from "no inherent secret defect; that it was known, or might, by the exercise of due skill and attention, have been known, to the defender who was the employer of the deceased" (e). Lord Neaves says defective machinery may presume negligence and throw the onus on the defender; but if he proves that he bought the article in the best market, that to all appearance it was sound and well fitted for its purpose, and that there was no discoverable defect in it, that will be sufficient to relieve him from a claim of damages (f). There is always implied some *culpa*; but if he has used all the precautions that a careful man can do, and has taken as much care of others as himself, he has a good defence (g).

(a) *Welsh v. Moir*, 12 R. 590.

(e) *Ld. Chancellor in Weems v.*

(b) *Heske v. Samuelson*, L. R. 12

Mathieson, 4 Macq. 215.

Q. B. D. 30.

(f) *Ovington v. M^r Vicars*, 2 M.

(c) *Cripps v. Judge*, L. R. 13 Q. 1066, 1074.

B. D. 583.

(g) *Sneddon v. Adie*, 11 D.

(d) *Howe v. Finch*, L. R. 17 Q. B. 1159.

D. 187.

Nor is the question for decision whether the master might not have provided better machinery. An employer is not bound to keep pace with mechanical invention. He cannot always be renewing his plant, and he is not bound to discard an old machine in order to make room for some new improvement. Judged by the existing standard it may be very defective; but it was suitable at the time, and it is not out of repair. If from age or wear it is suffered to fall into disrepair, there is a breach of the duty to keep it in repair inferring responsibility; but apart from this the word defective is not to be taken as synonymous with "careless" or "negligent." When, for example, such an appliance as a lift or a hoist is erected in which subsequent experience discloses some weak point, the question is whether a person of ordinary care, in the state of mechanical knowledge at the time, would have selected the particular form which was adopted; if it was the ordinary form there is no negligence; and negligence founded on its continued use after it had been superseded, would require to be supported by evidence to the effect that by prudent persons it had been generally discarded (a).

If a machine is defective, and in consequence a servant is injured, the master will not be relieved from liability by the fact that the negligence of a co-servant contributed to the injury; for, granting that under his contract he takes the risk of the negligence of his fellow-workmen, he has only agreed to take such risk on the assumption that they will be furnished with proper instruments (b).

If the accident can be traced to some specific defect in the apparatus, it is for the master to explain how it remained undiscovered and unremedied. *Prima facie*, the fact that it was so is inconsistent with the existence of a proper system of periodical inspection such as is in force in all well-regulated establishments; and if its non-observance is incapable of explanation, it will be presumed to have arisen from

(a) *Wisely v. Ab. Harb. Comrs.*, 14 R. 445.

(b) *Matthews v. M'Donald*, 3 M. 506.

his negligence, or the negligence of the person whose duty it is to see that the works and machinery are in proper condition. In the law of damages this presumption is often applied to chains and tackle liable to get weak from daily use, and which, therefore, should be periodically inspected and tested. Where the defective link which gave way could not be examined after the accident,—having been picked up by the foreman and thrown into the river,—the Court assumed that it was so bad as to be unfit to bear examination, and found the employer responsible (*a*).

So, where a hoisting gear, fitted up in the usual way on board ship, fell on a man working in the hold below, the Court, in the absence of any proper explanation how it happened, held the shipowner liable in damages (*b*); and a like decision was given where a rope broke from some mysterious “nip,” which could have been detected if it had been examined hand over hand before being used (*c*). But in these cases the pursuer was able to point out the specific defect. When this is only guessed at, the defender is not bound to prove anything, and the *onus* incumbent on the pursuer remains undischarged (*d*).

The question of what is due care on the part of the master often arises in connection with novel methods which, from considerations of economy, he is trying for the first time, and in which the result proves that there was some serious defect which at the time was overlooked. In such an event it is for the master to have it properly tested before being put in operation; and where this has been omitted, he will have to answer for the consequences. For example, a boiler many tons in weight had to be lifted a short distance above the ground to enable a workman to get beneath it. The method followed was to have it suspended from a pair of shears by means of chains attached to a gland bolted round the circumference. The gland gave way, being unequal to

(*a*) *Rooney v. Allen & Co.*, 10 R. 1224.

(*b*) *Walker v. Olsen*, 9 R. 946.

(*c*) *Fraser v. Fraser*, 9 R. 896.

(*d*) *M'Farlane v. Thomson*, 12 R.

232.

the strain; the man beneath the boiler at the time was instantaneously killed; and it being proved that the method adopted was an unsafe one, suggested by the defender himself, he was held responsible both by the Court and the House of Lords (*a*). Again, where a foreman in moving a casting two tons in weight placed it on a bogey attached to a tackle fixed to the roof of the shed with slack enough to let it run forward, but failed to notice that if the bogey slipped from under it, the weight, swinging back to the perpendicular, would come against the men stationed behind it,—which really happened,—the employer was held responsible for not anticipating a danger which might possibly happen (*b*).

To render an employer answerable for his plant, it is not necessary that it should belong to him in property. If lent to him by a neighbour, or hired for the day, it is nevertheless, in the words of the Act, “used in his business,” and he is responsible for any accident due to a defect in its condition (*c*). In agricultural operations machines are now employed which are so expensive as to be almost beyond a farmer’s means: and a class of agents exist who buy them from the makers and hire them out at so much a day. It may be argued that in such a case the farmer ought not to be as answerable for the machine as he is for his ordinary plant, and that the most he can be expected to do is to use due diligence in going to a good agent to get a good article. But this is a view which, it is thought, cannot be supported. The duty cast upon an employer to take due care of his workpeople’s safety attaches to the use of machinery which is under his control at the time, whether it belongs to him or not: and in accidents from agricultural machinery the farmer is liable, if under the contract of hire he had control of the work. On the other hand, the owner may be liable to him in relief; for on

(*a*) *Weems v. Mathieson*, 4 Macq. 215.

(*c*) *Jones v. Burford*, 1 Times L. Rep. 137.

(*b*) *Bowie v. Rankin & Co.*, 13 R. 981.

the hire of any moveable subject the lessor contracts that the article to be furnished shall be reasonably fit for the purpose to which it is to be applied, unless the defect was undiscoverable by any ordinary or reasonable means of inquiry and examination.

Buildings and Premises.—A person who invites another on his premises impliedly represents that he may safely come; and if he suffers him to walk into a hidden danger, he is liable for not warning him beforehand. The duty may not be owing to a bare licensee, who takes the premises as he finds them, and a guest or visitor has no claim against his host so long as there is no design to injure him, and the danger is not of the nature of a trap (*a*). But all who come on the premises on the proprietor's invitation, express or implied, not as mere volunteers, but for the purpose of transacting business—a customer going into a shop to buy goods, a passenger arriving at a railway station to be taken on by the train, a workman sent by his master to execute repairs, a person making use of the accustomed path to reach the house where he has business to transact (*b*)—are entitled to assume that their safety will be taken care of; and if they fall into some trap, the owner will be responsible. The same holds as between master and servant, with this qualification, that if the defect was known to both parties, the danger is included in the contract. His fault lies in continuing to work on premises which he knew to be unsafe. To make a relevant case, he must aver that the danger was known to the master and unknown to him; for it is the knowledge of the one and the ignorance of the other which go to make the cause of action (*c*).

The leading case on this subject is *Indermaur v. Dames* (*d*). A gasfitter, sent to the premises of a sugar-refiner to do

(*a*) *Southcote v. Stanley*, 1 H. & N. 247; *Hounsell v. Smith*, 7 C. B. (N. S.) 731. (*c*) *Griffiths v. London, etc., Docks*, 13 Q. B. D. 259.

(*d*) L. R. 1 C. P. 274.

(*b*) *White v. France*, 2 C. P. D. 308.

certain repairs, fell accidentally, without negligence on his part, through an unfenced hole, a shoot, through which bags of sugar were lowered and raised to the different flats. As the plaintiff was lawfully on the premises, and from its nature the shoot was dangerous to persons not acquainted with it, the owners were held guilty of negligence in not giving notice of the danger, or by lighting and fencing, guarding against it (a).

In these cases the claim is against the occupier, not against the landlord. Unless he has either let the premises in a ruinous condition or has covenanted to do repairs, he is not responsible for their condition (b). But a dock company, whose business it is to provide accommodation for vessels, is answerable for the safety of the means of access from the quay to the ship, as that is part of its undertaking; and likewise the sufficiency of the staging which it has agreed to provide for the use of workmen engaged in painting or repairing the vessel (c).

Defective Rules — Improper System.—The statute enacts that an employer shall be liable for an injury caused by the act or omission of any person in his service, done or made in *obedience* to the rules or bye-laws of the employer, or to particular instructions given by any person delegated with the authority of the employer in that behalf. This, of course, means where the rule, bye-law, or instructions were improper or defective. No complex business can be carried on with safety to those engaged in it except under some well-regulated system. The duty incumbent on the master, as regards the method in which his work is conducted, is illustrated by the early case of *Sword v. Cameron*, which arose out of a quarry accident, due to there being no proper system of

(a) *Brody v. Parker*, 14 R. 783; (c) *Smith v. London & St. Catharine's Dock*, L. R. 3 C. P. 326; *Cairns v. Boyd*, 6 R. 1004; see *Heaven v. Pender*, 11 Q. B. D. *supra*, pages 208–209.

(b) *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311.

giving warning before the blast was fired. In an action by a workman who had been injured, the employer defended himself on the ground that it was the practice of the quarry; and the Sheriff held that the pursuer should have "adapted himself accordingly" (a). But Lord Cockburn observed that a master was not entitled to conduct his work in such a way that his people suffer unnecessarily in life and limb. The master's liability depends on the question whether any of the precautions usual and customary in the particular operation were omitted. If they were customary with other employers when their workpeople were exposed to similar hazard, it is a breach of duty never to have adopted them (b); if they had been adopted, but on the particular occasion were overlooked or forgotten, the employer is equally guilty of negligence; and failing to notice that the precaution was omitted is not contributory negligence on the part of the workmen (c). Nay, if the work is attended with an unusual hazard to the workmen engaged, it has been held to be the duty of the employer by himself or his foreman to give his personal superintendence, to see that every precaution is taken for the men's safety (d). The common law allowed the master to rid himself of all responsibility, by sending a competent foreman to assist and direct the more inexperienced labourers in the execution of dangerous works (e). But under the amended law he remains answerable, whether he attends in person or by deputy.

While it cannot be said that failure to adopt a code of printed regulations is negligence *per se*, laxity in their enforcement, if adopted, would certainly be so, and the enactment of defective and improper rules now renders the master liable in damages for the injuries which may be the consequence (f).

In some cases the dangerous character of the occupation is

(a) 1 D. 493.

(e) *Pollok v. Cassidy*, 8 M. 615.

(b) *Grant v. Drysdale*, 10 R. 1159.

(f) *Chicago R. R. Co. v. Taylor*, 17 Am. Rep. 626; *Vose v. Lanc. Ry.*, 2 H. & N. 728.

(c) *McInally v. King*, 14 R. 8.

(d) *Cook v. Shank*, 14 R. 1.

known to both parties (a); in others it is concealed from the workman; and if an accident then arises, the fact that the danger was known to the master and not to the servant will entitle him to damages (b).

Volenti non fit Injuria.—When a work is obviously dangerous, it is the duty of a workman to look to his own safety and leave it; and if, failing to do so, he is subsequently injured, no action at his instance is competent; for in the full knowledge of the danger he has assumed all the risks incident to the unsafe state of things. The plea that the servant continued to work in the knowledge of the danger, and voluntarily encountered the risk, is sometimes expressed by the phrase, *volenti non fit injuria*. As already pointed out, this is not the same as contributory negligence, which can occur only when there is a duty owing by the one party to the other, and the duty is neglected; while the principle now adverted to assumes that the master is released from any duty in the matter, the workman having agreed to take all the risk on himself and look to his own safety. Of this the case of *Crichton v. Keir* (c) is an illustration. The accident arose from the workman being furnished with a horse unfit from age and otherwise for the work it had to do. It was held that, as the pursuer was just as good a judge as his master of the qualification of a horse, and had continued to work with it after he had knowledge of its defects, he had done so at his own risk, and not the risk of his master (d).

The same law was applied in a case relating to a mining accident, where the master had failed to supply “sprags” of a proper shape, and his failure ultimately led to an accident. The Court held that as the evidence showed that the pursuer had been all through fully cognizant of the danger, he had no

(a) As in *Woodley v. Met. Dist. Docks*, L. R. 12 Q. B. D. 493, 13 Ry., L. R. 2 Ex. D. 384. Man hired to do dangerous work in a railway tunnel. Q. B. D. 259; *Williams v. Clough*, 3 H. & N. 258.

(c) 1 M. 407.

(b) *Griffiths v. Lond. & St. K.* (d) *Fraser v. Hood*, 15 R. 178.

right to damages for continuing to work with such imperfect implements (*a*). This judgment proposed to follow the case of *M'Neil v. Wallace*, where it was part of the miner's duty to prop up the roof of the pit with wood supplied by the master for the purpose. And the Court held that a miner who had been unable to obtain wood was not entitled to go on with the work in the knowledge of the danger. "Where," said the Court, "the pit is unsafe owing to failure in duty on the part of the master, the duty of the collier clearly is to abstain from working; and in such a case he will be entitled to his wages though he do not work" (*b*). The miner who had been injured by the fall of the roof through the master's breach of duty was therefore not entitled to damages.

In the above cases the danger was "seen," and the workman, with full knowledge of its nature, voluntarily agreed to risk it. There is nothing illegal in a workman agreeing with his employer to work under any conditions however hazardous. It is all a matter of contract; and he cannot complain if in the end he was less fortunate in escaping the danger than he anticipated (*c*). But in most cases the workman makes no such agreement: he has entered the service with no intention of incurring any risk; and the question is, whether in the circumstances which subsequently emerge any such agreement is to be implied.

It is evident that no such agreement is to be inferred from the bare fact that the workman saw, or might have seen, the danger, and went on working without complaint. A passenger about to take his seat on a coach has doubts as to one of the horses. Is it his duty forthwith to give up his journey? A person arriving at a railway station on a snowy morning notices that the steps leading down to the platform are worn, and there may be danger in descending. Is he only to do so at his own risk? (*d*). In such cases as these the maxim *volenti non fit injuria* has no application, for it assumes that both parties

(*a*) *M'Gee v. Eglinton Iron Co.*,
10 R. 955.

(*b*) 7 July 1853, 15 D. 818.

(*c*) *Woodley v. Met. Ry. Co.*, *sup.*

(*d*) *Osborne v. L. & N.-W. Ry.*, 21

Q. B. D. 220.

had equal means of knowledge, and were equally capable of forming a judgment of the risk. This may often be said of master and servant, but not always; and as a general rule, it must be assumed that the employer has a better and more comprehensive knowledge of the safety and suitability of the means and appliances than the employee. It is not a matter to which the latter is called on to apply his mind at all. On the contrary, he is entitled to trust to the employer doing what may be necessary for the protection of those engaged in his services; and if he has any doubts on the subject, he may be reasonably excused for surrendering his own judgment to the better knowledge of his master, on whom he has a right to rely (*a*). It has accordingly been held, that to justify the plea proof of mere knowledge is not enough, for a man may know of the existence of a certain danger without fully appreciating the risk; and unless the circumstances disclose a willingness on the part of the workman to take it on himself in the full knowledge of the risk he was running, the defence will not avail. Accordingly, it does not apply to young persons serving as apprentices or otherwise, who from their age, sex, and inexperience cannot be expected to be capable of taking the same care of themselves as the older hands, and whose safety the employer, standing in a sense *in loco parentis*, is bound specially to attend to. In one case it was held that the employer was in fault in putting a girl under fourteen to work at a carding machine; for although the work was safe enough if she had attended to the instructions given her, and had acted with the care and caution which might have been expected from an older person, that very circumstance showed where the master was to blame (*b*). Nor does the maxim apply when the servant has complained to the employer or some superior workman that the place is unsafe, or the machine insufficient, and is induced to remain at his work on the assurance that his fears are groundless, or on a promise

(*a*) *Powers v. N. Y. & Lake Erie*, 98 N. Y. 274, 280; see Lord Neaves 12 R. 574.
(*c*) *Sharp v. Pathhead Spin. Co.*,
in *Crichton v. Keir*, *sup.*

that the defect will be duly repaired. In such a case the risk continues with the master, and there has been no waiver of the workman's right to damages. Obviously the master cannot complain if he has taken his advice (a), and instead of leaving consented to remain. "If nothing more is proved than that the workman saw danger, reported it, but on being told to go on went on as before in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk on himself; fear of dismissal rather than voluntary action might properly be inferred. *A fortiori* might the jury properly come to such a conclusion if it was proved that the workman was told by his superintendent not to mind, and that if any accident happened the employer must make it good" (b). It was accordingly held that a mason's labourer who, after complaining that the scaffold was insecure, was told to go on with his work, and through obeying the order was severely injured, had not barred his claim to damages. "Although," said Lord Deas, "the pursuer doubted the safety of the gangway he was told to go upon it, and he had no alternative but to obey, or run the risk of dismissal without wages, or perhaps other employment to go to" (c). He has his own duty to attend to; he has a right to assume that due consideration has been given to the safety of himself and the other men; and if the arrangements should subsequently prove defective, he is not to be charged with recklessness in accepting them as sufficient, even when he has his own doubts on the subject (d). In accordance with these views, it has been held that where a "suspicious" stone in the roof of a mine had been pointed out to the foreman, who had caused it to be temporarily secured, and told the men to go on with their work, the fact that they had done so did

(a) *Clark v. Holmes*, 7 H. & N. 937.

(b) Per Lindley, L. J., *Yarmouth v. France*, L. R. 19 Q. B. D. 647.

(c) *Brownlee v. Macaulay*, 22 D. 975.

(d) *Grant v. Drysdale*, 10 R. 1159; *Gibson v. Pacific R. R.*, 46

Mo. 163; *Wood, Master and Servant*, 713.

not bar their claim ; and where, in excavating a bank of earth, the watch had been omitted which it had been the custom to set at the top of the embankment, to give notice to the men below in time to retreat before the falling debris, it was held to be no proof of contributory negligence that the men had failed to notice that the customary precaution had on the particular occasion been omitted (a).

In the case of *Thomas v. Quatermaine* (b), the English Court of Appeal applied the principle of *volenti non fit injuria* to the decision of an action where the claim was rested on the dangerous condition of the premises in which the workman was required to carry on his work ; and as for many months the plaintiff—a man of full intelligence—had seen and apprehended the danger, and elected to continue working near it, it was held that he had no claim against his master under the Act.

The duty is imposed on the workman as a matter of statutory obligation to assist the employer in discovering and remedying defects as soon as they come to his knowledge. It is enacted—

“ A workman shall not be entitled under this Act to any right of compensation or remedy against his employer in any case where he knew of the defect or negligence which caused his injury, and failed within a reasonable time to give or cause to be given information thereof to his employer, or to some person superior to himself in the service of his employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.” This evidently refers to a defect so manifest as to be suggestive of danger,—such as the state of the roof, the condition of the lining of a pit, etc. (c).

Contributory negligence still remains as a defence under the Act. The workman who is injured by any of the five enumerated causes, or in case of death his representatives, is,

(a) *M'Monagle v. Baird*, 9 R. 364 ; *M'Inally v. King*, 14 R. 8 ;
 (b) L. R. 18 Q. B. D. 685.
 (c) *Marshall v. Omoa*, 14 D. 596.
Murdoch v. M'Kinnon, 12 R. 810.

subject to the provisions of the Act, to have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in the work. The meaning appears to be, that the workman's remedy in the cases stated shall be co-extensive with the remedy which would have belonged to a member of the public had such been his position at the date of the action. The remedy, however, if as great, is to be no greater than what is possessed by the public, and therefore the action may still be met by a plea of contributory negligence. This does not mean that the deceased was aware of the hazardous nature of the occupation, and persisted in it. It must be shown that he acted in so negligent a manner as really to cause the injury. The plea in effect amounts to this, that although the master may be to blame for having an imperfect machine in his workshop, the servant cannot recover if, but for his own careless handling of it, no accident would have occurred (*a*). Thus a miner, who went down an incline at the bottom of a pit in the knowledge that a rake of trucks was about to follow, and by which he was overtaken before he could reach a place of safety, was found not entitled to throw on his employer the consequences of his rashness (*b*).

The Coal Mines Regulation Act. — By the statutes which have been passed for the regulation and inspection of coal mines, certain duties are imposed on the owner of the colliery for the protection of the workmen, which have been fenced by penalties recoverable on a complaint at the instance of or with concurrence of the procurator-fiscal. The different Acts which were enacted between 1872 and 1886 have been consolidated with amendments in the Coal Mines Regulation Act of 1887. Every mine is required to be under a manager, who shall be responsible for the control, management, and direction of the mine; and the owner or

(*a*) *Webbin v. Ballard*, L. R. 17 Q. B. D. 122.

(*b*) *Wilson v. Wishaw Coal Co.*, 10 R. 1021.

agent failing to nominate himself or some other person to be such manager is liable to a fine (a). Certain returns are ordered to be made periodically, and failure to make or falsehood in making the same (b), as well as failure to send notice to the inspector of the district of accidents involving loss of life or personal injury, is also an offence (c). The Act 50 & 51 Vict. c. 58 likewise contains a series of general rules for securing the proper ventilation and the safe working of the mine (d), and it provides (§ 50):—"Every person who contravenes or does not comply with any of the general rules in this Act, shall be guilty of an offence against this Act; and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules or regulations for the working of the mine, to prevent such contravention or non-compliance." A like provision is made with respect to the special rules which may be passed with the sanction of the inspector and the approval of the Secretary of State for the conduct and guidance of the persons employed in any particular mine (e). In Scotland offences are to be prosecuted summarily before the Sheriff; and the conviction is to be in the form given in the Summary Procedure Act, 1864 (f).

The work of supervision is entrusted by the Act to a manager and an under-manager nominated in writing by the owner of the mine. These two persons between them are responsible for the *personal* supervision *daily* of the mine (g).

In case of a mine being abandoned, the duty of causing the top of the shaft and any side-entrance to be securely fenced,

(a) § 20.

(b) § 33.

as a profitable concern, but consistent with physical and engineering difficulties.

(c) § 35.

(d) § 49. See *Wales v. Thomas*,

(e) § 51.

(f) § 67.

(g) § 21.

L. R. 16 Q. B. D. 340, as to "reasonably practicable," meaning not inconsistent with working the mine

so as to prevent accidents, is imposed on the owner and every other person interested in the minerals (*a*). But in the sense of this section, the interest of the lessee ceases with the expiry of the lease (*b*).

This legislation proceeds on the theory, that in an occupation so hazardous as mining, definite rules require to be laid down for the protection of both masters and workmen; but especially the latter, who are often ignorant and reckless. The rules, however, must be strictly enforced (*c*); and as it would be unjust to inflict penalties merely on the workmen, the owner himself is held accountable for any disobedience to the Act. Courts of justice were, however, unwilling to convict under a penal enactment unless the person proceeded against was personally in default (*d*), and therefore under the new Act he is allowed to prove in exculpation that he had taken all reasonable means to secure the due observance of the statutory regulations. On the construction of these words it was held that where one of two owners—although occasionally at the mine—lived at a distance, and never interfered in the management of the mine, which was entirely under the control of the other owner, who had been returned as certificated manager, the justices were entitled on the facts to find that he had taken all reasonable means to enforce the Act, and was not liable in the penalties. It was contended that the evidence showed that he had simply done nothing. But the Court considered that it would be a straining of the law not to accept his defence as sufficient; for what are the “reasonable means” which a non-resident owner would take to enforce the rules? He would appoint a certificated manager to reside at the mine, and take all the management (*e*). It has been held that a duty which is of statutory obligation cannot be waived; the workman cannot agree with

(*a*) § 37. *Arkwright v. Evans*,
49 L. J. M. C. 82.

(*d*) *Dickinson v. Fletcher*, L. R. 9
C. P. 1.

(*b*) See *Evans v. Mostyn*, L. R.
2 C. P. D. 547.

(*e*) *Baker v. Carter*, L. R. 3 Ex.
D. 132.

(*c*) *Dykes v. Merry & Cunninghame*,
8 M. 603; *Nimmo v. Clark*, 10 M. 477.

his master that he is willing to go on as if the statute had never been passed; the maxim *volenti non fit injuria* has no application; and the party to blame is liable for the consequences, whether the rule was broken with the workman's consent or not (*a*).

An action of damages for negligence lies notwithstanding the remedy by penalty (*b*), for wherever the right existed before the statute the penalty does not take it away; but, on the other hand, the imposition of a penalty does not deprive the defender in a civil suit of the plea that the work was being done for him under contract, or that the person primarily to blame was a fellow-servant of the pursuer (*c*). The two proceedings have in fact different objects,—the one to punish an offence, the other to redress an injury.

Under the Act of 1872 it was held that a mine-owner was not liable for the negligence of a certificated manager, because although appointed in pursuance of an Act of Parliament he was still simply a fellow-servant. But this is altered by the Employers' Liability Act (*d*).

At one time a mine-owner was responsible for the neglect of his underground manager in failing to secure the roof after the indications of danger were pointed out to him (*e*); but subsequent to *Wilson v. Merry* the master was held to have fulfilled his duty by appointing a competent person to that post (*f*). The same applied to machinery. When the master appointed a skilled mechanic as foreman of the machine room, he was exempt from responsibility (*g*). But these cases are now repealed by the new Act, under which the employer is answerable for negligence by a foreman, etc., when engaged in the duty of superintendence.

(*a*) *Baddeley v. Earl of Granville*,
19 Q. B. D. 423.

(*b*) *Couch v. Steel*, 23 L. J. Q. B.
121.

(*c*) Lord Chelmsford in *Wilson v. Merry*, L. R. 1 Sc. Ap. 326, 341;
see also *Atkinson v. Newcastle Water Works*, L. R. 2 Ex. D. 441.

(*d*) *Howells v. Landore Co.*, L. R.
10 Q. B. 62.

(*e*) *Paterson v. Wallace*, 16 D.
248, 17 D. 16, 623.

(*f*) *Sneddon v. Mossend Iron Co.*,
3 R. 868.

(*g*) *Balleny v. Cree*, 11 M. 626.

Factory Acts.—The factory legislation dates from the year 1802. The earliest Act was directed to purposes sanitary and educational; the regulation of labour dates from a later period, after steam-power had been applied to spinning and weaving (*a*). The Act now in force is a consolidating Act, which was passed in the year 1878 (*b*), on the report of a Royal Commission. A factory was formerly defined to mean a place in which cotton, wool, etc., were operated on by the aid of steam or water power. The present Act deals with five different classes of works—textile factories, non-textile factories, workshops (where no power is used), workshops in which neither children nor young persons are employed, and domestic workshops (*c*).

The provisions of the Act for securing safety and preventing accidents are to the following effect:—

A hoist or teagle, steam-engine, water-wheel, mill-gearing, must be securely fenced in textile and non-textile factories, but not in workshops.

This now applies to any hoist or teagle near to which any person is liable to pass or be employed, and is no longer confined to the protection of children, young persons, and women (*d*). It is not sufficient that the fencing be of the kind used and approved in the district; but it is for the jury to say whether the best means known at the time have been adopted (*e*).

Mill-gearing is not belting. It comprehends every shaft, upright, oblique, or horizontal; and every wheel, drum, or pulley by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process (*f*).

It has been held, on a former Act, to be no excuse for not

(*a*) 42 Geo. III. c. 73.

(*b*) 41 Vict. c. 16 (Factory and Workshop Act, 1878); 46 & 47 Vict. c. 53 (Factory and Workshop Act, 1883); 45 & 46 Vict. c. 22 (Boiler Explosions Act, 1882).

(*c*) 41 Vict. c. 16, § 93.

(*d*) See *Britton v. G. W. Cotton Co.*, L. R. 7 Ex. 130; *Coe v. Platt*, 6 Ex. Ch. 757.

(*e*) *Schofield v. Shunk*, 24 L. J. 253.

(*f*) § 96; *Holmes v. Clarke*, 30 L. J. Ex. 135; 31 L. J. Ex. 356.

fencing a shaft being part of mill-gearing in motion, that it was so situated as not to be suggestive of danger (*a*); and in one case the Second Division held an employer bound to fence a wheel to which no one could get access except by stepping over a bar and squeezing himself between the machine and the wall (*b*). But this Act offers the alternative—either it must be securely fenced, or be in such a position, or of such a construction, as to be equally safe to every person employed in the factory, as it would be if it were securely fenced.

It is directed that all fencing shall be constantly maintained in an efficient state, and no part is to be unfenced when in motion or use for the purpose of any manufacturing process; but the owner is not liable when the machine is not working, or working for other than a manufacturing purpose (*c*).

When an inspector considers that in a factory any part of the machinery of any kind, moved by steam, water, or other mechanical power to which the above provisions do not apply, is not securely fenced, and is so dangerous as likely to cause bodily injury to any person employed in the factory, the Act provides a method of proceeding, including the decision of the question by arbitration (*d*). In like manner notice may be given by the inspector of a vat or pan containing hot liquid or metal which appears to him to be dangerous, or of a grindstone fixed in a faulty manner.

The Act applies to children under 14; young persons, 14 to 18; and women above 18. The employment of a child in cleaning machinery in motion, and of a child, young person, or woman in cleaning mill-gearing in motion, is prohibited; and they are not to be allowed to work between the fixed and traversing parts of any self-acting machine while in motion by the action of steam, water, or other mechanical power (*e*).

The Act directs that notice of accidents be sent to the inspector and certifying surgeon, if fatal, or when caused by

(*a*) *Doel v. Shepherd*, 5 E. & B. 856.

(*b*) *Traills v. Small & Boaze*, 11 M. 888.

(*c*) *Coe v. Platt*, 22 L. J. Ex. 164.

(*d*) § 6, 7, 8.

(*e*) § 9.

machinery moved by power, or a vat or pan, and likely to prevent the injured person from returning to his work for forty-eight hours after the accident (a). The certifying surgeon is appointed to report the same to the inspector; and if any person suffer bodily injury from neglect to fence machinery requiring to be fenced, the occupier is liable to a penalty of £100, which may be applied by the Secretary of State for the benefit of the injured person (b).

Where there has been a breach of the statutory duty to fence, the fact that the statute imposes penalties does not deprive the injured person of his right of action, the remedy by penalties being cumulative (c). But the statute is subject to two important qualifications. In providing for the workman's protection, the statute assumes that he will still be careful of his own safety; and, on the other hand, the master who complies with the Act is not thereby exonerated from the common law duty of seeing that all his machinery is reasonably safe.

It has accordingly been held to be a good defence as against an action founded on the statute, that the workman was himself guilty of contributory negligence, just as it would have been had the action been founded not on the statute, but common law. Where it was admitted that a certain shaft was not fenced,—as it ought to have been,—but the plaintiff was said to have wilfully laid hold of the strap when it was at rest and set it in motion, knowing the danger, and that it was against orders, the Court held that he could not recover. While the Legislature, it was said, had interfered for the protection of young persons, it would be against all principle to hold them entitled to compensation for what was due to their own misconduct (d).

As already observed, if a workman, after complaining of a

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| (a) § 31. | (b) § 82. | the decision was rightly applied: |
| (c) <i>Caswell v. Worth</i> , 25 L. J. Q. B. 121; <i>Couch v. Steel</i> , 23 L. J. Q. B. 402. | <i>Britton v. G. W. Cotton Co.</i> , L. R. 7 Ex. 130; <i>M'Cracken v. Dargan</i> , 1 Ir. Jurist, N. S. 404 (Q. B.); <i>Traill v. Small & Boaze</i> , 11 M. 888 (doctrine questioned). | |
| (d) <i>Caswell v. Worth</i> , 25 L. J. Q. B. 121. <i>Sed qu.</i> if the principle of | | |

want of fencing, resumes work on the assurance that the defect will be repaired, he does not waive his right to damages, and the master takes upon himself the responsibility of any accident that may therefore occur (*a*).

Moreover, although the machinery may be sufficiently fenced to satisfy both the statutory and common law obligation, the master may incur liabilities by employing a young person about it, quite inexperienced with its use, or with directions which are insufficient,—or likely to lead to danger of which the young person is not aware, and the owner should be aware. In such a case he is guilty of negligence; for work, however light, may have to be done at a machine with which no one but a person of experience ought to be entrusted (*b*).

Who are within the Employers' Liability Act.—*Railway Servants.*—A railway company is answerable for the negligence of any one in their service who has the charge or control of any signal-points, locomotive engine, or train upon a railway. A temporary line is included in the word railway (*c*), but not a tramway—tramways being regulated by an Act of their own (*d*). A goods station is part of the line of railway (*e*), and a locomotive engine is not essential to a train, which may consist either of trucks filled with goods or carriages laden with passengers (*f*).

When the injury is done by an “engine or train on a railway,” the pursuer has next to show that it was due to the fault of some person in the service of the company who had charge or control of a signal or points, or of the engine or train. A person whose duty it was to oil the points under the orders of another was held not to fall within this description (*g*).

Seamen.—The Act applies to persons engaged in inland

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| (<i>a</i>) <i>Holmes v. Clark</i> , 30 L. J. Ex. 135; <i>Murdoch v. McKinnon</i> , 12 R. 810. | (<i>d</i>) 33 & 34 Vict. c. 78. |
| (<i>b</i>) <i>Grizzle v. Frost</i> , 3 F. & F. 622; <i>Sharp v. Pathhead Spinning Co.</i> , <i>sup.</i> | (<i>e</i>) <i>Cox v. G. N. R. Ry. Co.</i> , 9 Q. B. D. 107. |
| (<i>c</i>) <i>Doughty v. Ferbank</i> , L. R. 10 Q. B. 358. | (<i>f</i>) <i>Cox</i> , <i>sup.</i> |
| | (<i>g</i>) <i>Gibbs v. Gt. West. Ry.</i> , L. R. 12 Q. B. D. 208. |

navigation on a lake or canal (*a*), but not to those employed on a sea-going vessel (*b*). A shipowner, however, is taken bound by the Merchant Shipping Act of 1876 (*c*), as part of his duty to the crew, to use all reasonable means to secure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition during the same. The want of a spoke in the wheel, which made the man steering apt to lose grip of the wheel, and which led to an accident to one of the seamen, has been held to be a breach of this obligation; and the common law rule of "seen danger" does not apply to a seaman on board a ship which, after leaving port, is found to be imperfectly equipped (*d*).

Workman—defined.—This means any person who, being a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labour, works under a contract of service personally to execute any work or labour,—such contract being express or implied, verbal or written (*e*). The essence of this clause is, that a workman is a person engaged in manual labour (*f*), and the enumeration of the different kinds of labour is intended to be simply auxiliary to this—that the man makes his living by means of work involving bodily exertion, and more or less some manual skill. It is obvious, also, that a person may be engaged in manual labour, within the meaning of the statute, although he has, in addition (*g*), duties of a different kind to perform.

The Act does not apply to a domestic or menial servant; but a dairymaid is a servant in husbandry (*h*); and a tramway conductor is a workman within the Act (*i*).

(*a*) *Oakes v. The Monkland Iron Co.*, 11 R. 579.

(*b*) *G. N. R. v. Edgehill*, L. R. 11 Q. B. D. 225.

(*c*) 39 & 40 Vict. c. 80, § 5.

(*d*) *Ruthwell v. Hutcheson*, 13 R. 463.

(*e*) 38 & 39 Vict. c. 90, § 10; 43 & 44 Vict. c. 42, § 8.

(*f*) *Grainger v. Aynsley*, L. R. 6 Q. B. 182.

(*g*) *Shaffers v. Gen. Steam Nav. Co.*, L. R. 10 Q. B. D. 356.

(*h*) *Exp. Hughes*, 23 L. J. M. C. 138.

(*i*) *Wilson v. Glasgow Tramways Co.*, 5 R. 981; *secus Morgan v. London Gen. Omnibus Co.*, L. R. 12 Q. B. D. 201, 13 Q. B. D. 831.

Sum Recoverable.—The amount of compensation recoverable under the Act may not exceed such sum as shall be found to be equivalent to the estimated earnings during the three years preceding the injury of a person in the same grade employed during these years in the like employment, and in the district in which the workman is employed at the time of the injury. As the Act in effect only deprives an employer of a defence formerly open to him, it is competent for a workman, in engaging himself, to surrender the benefits of the Act (a). And there is no inconsistency in founding both on the statute and the common law, the claim being stated thus: "Damages laid at common law at £1000; or under the Employers' Liability Act at £100" (b).

Procedure.—Notice has to be served on the employer before action is brought; and no action is maintainable after the lapse of six months from the occurrence of the accident; and twelve months from the death, if the man has died.

The first of these provisions is a condition precedent,—intended to prevent frivolous actions, and give the employer an opportunity of settling the claim, if on inquiry he finds he is liable. The Court is accordingly empowered "in case of death" to dispense with it when a reasonable excuse is offered for its want or insufficiency, and the defender has not been prejudiced in his defence (c). The second provision is an absolute bar to the action, intended to protect employers against actions when, owing to lapse of time, the facts are forgotten, or at least are no longer fresh in the recollection of the persons available as witnesses. It has been held that a common law action could not be turned by amendment into an action founded alternatively on the statute after the lapse of six months (d); and when an action, both on the common law and the statute, is raised beyond that term, it is the duty of the sheriff to pronounce an interlocutor finding that the action, so far as rested on the statute, could not be maintained.

(a) *Griffiths v. Dudley*, 9 Q.B.D. 357.

(c) *Trail v. Kelman*, 15 R. 4.

(b) *Magee v. Dalgleish, Falconer*,
5 Co., 11 R. 857.

(d) *Clark v. Adams*, 12 R. 1092;
Johnston v. Shaw, 21 S. L. R. 246.

The notice must be in writing, by the claimant or some one in his behalf (*a*),—not necessarily at one time or in one letter (*b*); and expressed in ordinary language, which will not be construed with rigorous strictness whenever the information given is sufficient to enable the employer to make inquiries into the case which he has to meet (*c*). The name and address of the person injured, the cause of the accident, and when it happened, are the chief points. If it is, in fact, delivered in time, the mode of delivery is immaterial; and when sent through the post, it is held to have been given when the letter would be delivered in ordinary course of post. In a case in which six weeks' notice was required, a notice which could not be received before the forty-third day was held to be too late (*d*).

Court.—Every action for recovery of compensation under the Act is directed to be brought in the Sheriff Court; but at the instance of either party it may be removed to the Court of Session in the manner provided, and subject to the conditions prescribed, by section 9 of the Sheriff Courts (Scotland) Act of 1877 (*e*). It is then tried by a jury on an issue adjusted in the usual way; or if it is deemed unsuitable for jury trial, proof will be ordered to be taken (*f*).

(*a*) *Moyle v. Jenkins*, L. R. 8 Q. B. D. 116. *son & Co.*, 12 R. 121; *M'Gowan v. Tancred, Arrol, & Co.*, 13 R. 1033.

(*b*) *Keen v. Millwall Dock Co.*, L. R. 8 Q. B. D. 482. (*d*) *M'Donagh or Henderson v. P. & W. M'Lellan*, 13 R. 1000.

(*c*) *Clarkson v. Musgrave*, L. R. 9 Q. B. D. 386; *Thomson v Robert-* (*e*) 40 & 41 Vict. c. 50.
(*f*) *Cochrane v. Ewing*, 10 R. 1279.

CHAPTER XIV.

THE MEASURE OF DAMAGES.

IN the assessment of damages, the principle on which a Court of law acts is *restitutio in integrum*—the principle of replacing the party who has received the damage in the same position in which he would have been if no wrong had occurred (*a*). But in the application of the principle, restitution does not always mean complete indemnification, for it has been found necessary to exclude certain items of damage that are held to be irrecoverable by reason of “remoteness,”—meaning thereby such damages as do not flow directly and naturally, *i.e.* in the usual course of things, out of the wrongful act. Beyond the direct detriment which is supposed to have been in view of the parties at the time (*b*), the wrong-doer is not liable for the consequences.

This simply embodies a maxim which has been recognised in every branch of law,—*causa proxima non remota spectatur*,—and which has been justified by Bacon on the ground “that it were infinite for the law to consider the cause of

(*a*) Per Dr. Lushington in the *Gazelle*, 2 W. Rob. 279. Although this was said in a collision case, the rule as thus expressed was held by his Lordship to be the one acted on, not in the Admiralty Court only, but in all courts. *The Columbus*, 3 W. Rob. 158, 162; *H.M.S. Inflexible*, Swab 200, 204.

(*b*) Lord Kinloch in *Allan v. Barclay*, 2 M. 873.

This rule is expressed in various forms. The “damage must be the *natural and reasonable* result of the

defendant's act,” Mayne, p. 45 (4th ed.); the “natural and proximate consequence,” says Greenleaf, cited and approved by Sedgwick. And in the New York Code: “For the breach of an obligation not arising from contract, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether anticipated or not,” Art. 1860. These different phrases have apparently all one meaning.

causes, and their impulsions one on another; therefore it contenteth itself with the immediate cause" (a). It is not intended to apply to a cause remote as regards distance, or remote in point of time; for so long as the loss is the sequence of the antecedent, without other independent co-operating cause, neither distance nor time can affect the question. But it comes into operation when there has been a succession of events all subsequent to the primary act, and we have to decide which of them was the efficient cause of the resulting damage; and also whether any damage would have occurred at all but for the concurrent action of some other event for which the wrong-doer is not responsible.

On this point it appears to be well established that a primary cause operating through natural agencies,—such as ice and snow, wind, rain or drought, in external nature,—or weakness of constitution in the person injured, does not on that account become the remote and not the proximate cause of the injury done; and when two persons acting separately or together have helped to produce the loss, so that it follows as the natural sequence of what they both did or omitted to do, they are both jointly liable (b).

"In assessing damages," says an American Court, "the direct and immediate consequences of the injurious act are to

(a) Bacon's Maxims of the Law, Works, vol. vii. p. 327.

(b) In *Ionides v. Universal Marine Assurance*, 32 L. J. C. P. 170, C. J. Earle said, "A proximate cause of loss is when the loss is the sequence of the other in the ordinary course of events."

In insurance law, "any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it," per Lord Penzance in *Dudgeon v. Pembroke*, L. R. 2 App. Ca. 284, 287.

In an Illinois case, where the question was whether a railway company

were responsible for a fire which had spread some distance from the line, the Court held, "If the fire is the consequence of the carelessness of the railway company, and the question of remote or proximate cause is raised, the jury should be instructed that so far as the case turns on that issue, the company is to be held responsible if the loss is a natural sequence of its alleged carelessness, which might have been foreseen by any reasonable person, but is not to be held responsible for injuries which could not have been foreseen or expected as the result of its negligence or misconduct," note in 7 Am. L. Rep. 80.

be regarded, but not remote speculative and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbour's field unlawfully and leave the gate open; if before the owner knows it cattle enter it and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and wilfully or obstinately, or through gross negligence, leaves it open all summer and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture and pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote. We think the jury were rightly instructed, that as the trespass consisted in removing a few rods of fence, the proper measure of damage was the cost of repairing it, and not the loss of a subsequent year's crop arising from the want of such fence" (a).

When the wrong complained of consists of a breach of contract, a second or supplementary rule comes into force, the intention of which is to secure that the party in fault shall not escape from the full weight of responsibility when there are specialities raising equitable reasons for his being subjected in the entire loss. If when the contract was entered into, or at any time before it was broken, and while it was still in his power to perform it, he had notice that a certain loss would be *likely* to result from its not being performed; the amount of that loss is the measure of his obligation. Or, as it has been otherwise expressed, the compensation that is due for a broken contract from the party to blame extends to and includes such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the

(a) Per C. J. Shaw (Mass.), *Loker* leave an insanitary house; *Scot. Her. v. Daman*, 17 Pick 284; Sedg. 4th *Sec. v. Grainger*, 8 R. 459; *Henderson* ed. 105; so a tenant is bound to *v. Munn*, 15 R. 859.

probable result of its breach. This, however, only applies to cases of breach of contract; and with that single modification or exception, the law only gives such damages as are produced immediately and naturally by the act complained of (*a*).

In discussing questions relating to the measure of damages, we naturally use such words as "indemnity" and "indemnification," and it has been objected that the second of the above rules in effect superinduces on the duties arising out of the original contract a second obligation to pay a certain sum of money on a certain event, without any adequate consideration. This view, however, is evidently erroneous; for an obligation *ex delicto* is not created by the will of the parties, like an obligation *ex contractu*, but in every case the right to damages arises as a consequence attached by law to the breach of contract (*b*). The damages are in no sense the subject of the contract, which does not bind the party to do a certain thing, or to pay a certain amount of compensation if he does not do it. The damages are simply the legal method of giving redress for the non-fulfilment of the defender's obligation; and so with any other form of wrong.

Personal Injury.—In an action for personal injury, the jury are not expected to measure their verdict so nicely as in a case of contract (*c*); but certain rules have come to be recognised for measuring what is capable of measurement, and the jury must make their calculations accordingly. The cost of medical and surgical attendance is matter of evidence; the loss of income when the injured party has been laid aside from business is also capable of proof; and the after effect, permanent or temporary, on his earning power may likewise be estimated approximately. But when we go farther and place in the scales the pain and suffering which the party

(*a*) *The Argentino*, L. R. 13 P. D. N.-W. Ry., L. R. 34 Ch. D. 261, 188; *Mackenzie v. Liddell*, 10 R. 276.

705.

(*c*) Cresswell, J., in *William v.*

(*b*) See *Birm. etc. Land Co. v. L. & Currie*, 1 C. B. 874.

has endured, in order to fix the sum which should be paid to him as *solatium*, no standard is available, and we have to be guided by equitable considerations. The law does not attempt to give full compensation, for few would pass through the agony of a railway accident again for any sum of money; while, bad as the conduct of the defender may have been, an excessive award would be to him both ruinous and unjust. The jury have to enter into the thoughts and feelings of the injured man, and say what the reasonable sum is with which in fairness he ought to be content. The usual direction is, "that they are not to give damages to the full amount of a perfect compensation, but must take a reasonable view of the case, and give what they consider under all the circumstances a *fair* compensation" (a). And in following this instruction, the way (says Lord Shand) "in which I have always understood that such compensation should be estimated, and in which it has been always estimated in practice, is by the jury taking into their consideration the whole circumstances of the case, looking at both the present suffering and permanent injury, and without trying to put a money figure on each separately, to fix a sum which will do justice between the parties" (b).

A second consideration of importance whenever *solatium* enters into the claim is that the jury are not limited to mere compensatory damage as in a case of breach of contract. In cases in which the defender has acted wilfully and in a high-handed, oppressive manner, or when a trespass has been accompanied by expressions that make the wrong an insult as well as an injury (c), this principle obviously applies. Even in actions founded on negligence only, it has been considered a material element for the jury to consider whether the accident resulted from very gross or a lesser degree of negligence. The defender is not entitled to say, "I admit

(a) *Arnsworth v. S.-E. Ry.*, 11 Jur. 758; appd. in *Roxley v. Co.*, 10 R. 242.
 (b) *Young v. Glasgow Tramways*
L. & N.-W. Ry., L. R. 8 Ex. 221, (c) *Embles v. Myers*, 30 L. J. Ex. 70.
 231.

liability, and you are not entitled to prove to the jury how the accident happened." They are not to value human existence as a "bale of goods;" it is their right and duty to examine all the circumstances; and reasoning from the effect which these have on their own minds, to judge what ought to be given to soothe and alleviate the pursuer's lacerated feelings (*a*).

The issue for the trial of the cause must therefore put the question of fault, whether it is admitted or not.

The jury being thus the proper judges of the question, the Court will not interfere with their verdict merely because they might have given more or given less if they had been on the jury. To entitle them to interfere, they must be satisfied that there has been misdirection by the judge, or a miscalculation by the jury, and that the sum awarded was unreasonably large or unreasonably small (*b*). The Lord President has said: "In order to justify a new trial being granted, we must be satisfied that the sum is altogether so extravagant that no other jury would repeat it. Unless it can be said that the verdict ought not to have been more than one half of the sum awarded, there is not, according to our practice, any room for interference" (*c*).

When the accident has been fatal, and the claimant is a widow suing for herself and children, the defender may be able to show that apart from *solatium*, the pursuer has sustained no pecuniary loss. When the deceased was without means and was incapable of earning anything, or when his entire estate passes to the family,—there is really no pecuniary loss requiring to be compensated. But when his whole income was due to his own exertions, physical or intellectual, it becomes necessary to consider what but for the accident which terminated his existence would have been his "reason-

(*a*) *Cooley v. E. & G. Ry.*, 8 D. 288. In this case Lord Medwyn said: "The wealth of a defender is an element always taken into consideration: I think the degree and amount of culpability stands in the same situation."

(*b*) *Adamson v. Whitson*, 11 D. 680.

(*c*) *Young v. Glasgow Tramways Co.*, *sup.*

able prospects of life, work, and remuneration; and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation" (a).

In this inquiry the jury start as a basis with his actual income at the date of the accident, and his chance of continuing to earn it; but as he might be disabled by illness or other causes from following his avocation, to take the value of an annuity as the proper value of a future open to so many contingencies, would plainly be erroneous; and it was held to be a misdirection when the jury were instructed to do so (b). The usual course rather is to allow a sum of money to cover the loss of income for a number of years, during which the injured person may be reasonably supposed to a greater or less extent to be disabled from following his profession. Lord Bramwell has explained how he would deal with the case of a labouring man who has been kept out of work for some months. "His evidence may be that before the time of the accident he was earning 25s. a week; that during twenty-six weeks he has been wholly incapacitated for work; that for ten weeks afterwards he has been able to earn only 10s. a week, and that he will not get into full work again for twenty weeks. The plaintiff will be entitled to 25s. for each of the twenty-six weeks, and to 15s. for each of the ten and twenty weeks. He is also entitled to some amount for his bodily sufferings and for his medical expenses; and in this manner the compensation to be awarded to him is estimated" (c).

In the case supposed, a definite term is assigned to the period of disability; where no definite term can be fixed, the right direction to the jury is—"that they must consider for themselves how long the plaintiff will be incapacitated

(a) *Grand Trunk Ry. Co. v. Jennings*, L. R. 13 App. 800. in a railway accident and earning £5000 a year was allowed in the first

(b) *Roxley v. L. & N.-W. Ry. Co.*, L. R. 8 Ex. 221. trial £7000. A new trial was ordered (4 Q. B. D. 406; 5 Q. B. D. 78),

(c) *Phillips v. L. & S.-W. Ry.*, L. R. 5 C. P. D. 280, 287. In this the jury awarded £16,000, and the verdict was upheld.

case a medical practitioner injured

from earning his livelihood or practising his profession; but that they must take into account the chance of his losing employment if he had not met with the accident" (a).

On the other hand, in diminution of damages, the jury may properly take into account the money provisions made by the husband in favour of the widow. If he was a man of independent income from property,—one half of which has been settled on the widow,—they may properly come to the conclusion that to the extent of this half the widow is no loser by his death. But if it comes from a policy of insurance effected by the husband on his own life in his wife's favour, the amount is not to be deducted from the damages assessed, because the benefit derived from the acceleration of the payment may be compensated by deducting from their estimate of the future earnings of the deceased the premiums which, if he had lived, he would have had to pay to keep up the policy (b). Nor can a sum received by the pursuer from a sick and an insurance fund be taken into account in reduction of damages (c).

A person who has met with an accident is bound to use ordinary care to cure and restore himself. He cannot recklessly enhance his injury and charge it to another. If his arm has been broken, he is bound to get it set. He is not obliged to employ the most skilful surgeon that can be found, but he is bound to act reasonably and in good faith; and if by mistake he innocently does something to retard his cure and impair his chances of recovery, he is entitled to recover the full extent of his damage from the wrong-doer.

(a) Per Ld. Bramwell in *Phillips v. L. & S.-W. Ry.*, *sup.* 287. A workman earning 10s. a week, struck blind at the age of 21, was allowed £400. *M'Kechnie v. Henderson*, 20 D. 551. Where the person disabled was the keeper of a small shop in which she earned £2 a week, the Court thought £450 not excessive, besides allowance for pain and medical expenses, *Young v. Glasgow Tram-*

ways Co., 10 R. 242 (Lord Shand dissenting); *Black v. Croal*, 16 D. 431. For the loss of an arm, the sum awarded was £150. *Trail v. Small & Boase*, 11 M. 888.

(b) *Grand Trunk Ry. Co. v. Jennings*, *sup.*

(c) *Bradburn v. G. W. Ry. Co.*, L. R. 10 Ex. 1; *Yates v. White*, 4 Bing. N. C. 272.

The same follows where the mistake was committed by the physician, the patient himself being free from blame in not applying the remedy most appropriate to the case. A wrongdoer who has placed another in a position where he is bound to take his choice of remedies and doctors, cannot take advantage of any mistake which may be committed in that matter, so long as the damage has not been aggravated by the sufferer's own want of care (*a*).

Where the verdict is inconsistent,—the smallness of the damages showing that the jury had made a compromise, and instead of deciding the issue submitted to them had agreed to find for the pursuer without damages,—the Court grants a new trial (*b*).

Defamation.—Where special damage is not alleged or proved, the Court will not set aside a verdict in an action for defamation because the damages are too low; for in the opinion of the jury the sum awarded is enough for the vindication of the pursuer's character (*c*). But in libel cases a jury is often more concerned with what the defender should pay than what the pursuer should receive; and when they have been obviously too much influenced by the caustic nature of the attack, the Court will reduce the amount to a reasonable sum or grant a new trial (*d*).

It is no defence to a party repeating a calumny that he did not originate it; such a circumstance can only operate in mitigation of damages (*e*).

(*a*) *Lyons v. Erie Ry. Co.*, noted 50 Am. L. R. 604.

(*b*) *Stewart v. Caledonian Ry.*, 8 M. 486; first verdict for pursuer, damages, 1s.; second, £200.

(*c*) *Hamilton v. Hope*, 4 Mur. 253. This is also the English rule. *Rendall v. Hayward*, 5 Bing. N. C. 424; *Forsdike v. Stone*, L. R. 3 C. P. 607.

(*d*) In *Ritchie & Son v. Barton*, 10 R. 813, where a firm of tradesmen had been awarded a sum of £300, the Court, on the admission of the pursuers

that their business had not suffered, restricted the damages to £65 in name of *solatium*. In *Johnston v. Dilke*, 2 R. 836,—literary critique on maps,—a verdict for £1275 was reduced to £100. *Leven v. Young*, 1 Mur. 373,—special damage claimed for loss of office,—the verdict though large, £2000, was supposed to be much below the justice of the claim, and verdict set aside.

(*e*) *Marshall v. Renwick*, 13 S. 1127.

The expression in the issue, "to the loss, injury, and damage of the pursuer," entitles the jury to consider everything that he has suffered in his feelings, character, credit, etc.; and, therefore, where a question as to the detention of an alleged lunatic had been tried out in one action, it was not allowed to be the subject of a second suit, brought as an action of defamation in respect of the medical certificate (*a*).

Injury to Heritable Subject.—Where a mill was destroyed by the bursting of a dam for which the defender was responsible, it was held that the pursuer, who was both proprietor and tenant, was entitled to damages in both characters. As proprietor his claims included the value of the mill and loss of rent, or its equivalent until it was rebuilt. As tenant, he was entitled to the expense of removing temporarily to another mill, and the difference between his receipts in the old and his receipts in the new mill, after deducting the rent paid for the latter; but as he failed to produce his books or instruct the loss by proper evidence, the claim on the latter head was disallowed (*b*).

In Maritime Causes.—In the chapter on Collisions at Sea (*c*) we have already indicated the principles on which the damages are assessed. The ship free from blame is entitled to (1) the expense of repair; (2) compensation for being thrown out of employment, being, *a*. damage for the time lost when the ship was under repair; and, *b*. the profit which would have been earned had the vessel been available. If it can be shown that she would have had no profitable employment, the damage is of course *nil*. But if employment had previously been offered and accepted, it only remains to calculate how much her earnings would have been. On this principle the Court acted where a ship despatched on a whaling voyage had been so badly repaired as to be compelled to return from Davis Straits to Montrose. The

(*a*) *M^rIntosh v. Weir*, 2 R. 877.

(*b*) *Kerr v. E. of Orkney*, 20 D. 298.

(*c*) *Sup.* 172.

damages given against the shipbuilders responsible for the mal-repair were, (1) the expenses of the fresh repairs; (2) the seamen's wages after the vessel put back; and (3) the loss of the fishing season. It was pleaded that no one could say, seeing the precarious nature of the adventure, that the vessel would have made anything. But Lord Lyndhurst observed that the vessel had been detained at Montrose when she ought to have been on her voyage—all owing to the deficiency of the original repairs, and the pursuers having been deprived of the fair chance of gaining the advantage resulting from the use of their vessel during that time, were entitled to compensation in the shape of damages (*a*). So, a party who had contracted to send a tug to save a vessel stranded on the rocks, was taken to have had notice that every tide was of importance, and was liable in the damage caused by delay in sending the tug (*b*). Where there is an actual charter party, the probable earnings of the vessel when out of employment by being detained in the graving dock are easily calculated; but even where there is no charter party, but only a promise and reasonable certainty of employment, the freight which she might have been expected to earn, is the damage recoverable (*c*).

In Commodate.—When a thing is lent for use (gratuitously or for hire), and the borrower returns it in a damaged condition, it is for him to prove that the injury was not due to any blame on his part; otherwise he is liable for the difference between the worth of the thing when delivered and its worth when restored. Not unfrequently, if a horse be brought home with broken knees, which is the common case, the account is made up by taking the price recently paid for the horse and the price which he fetched at a public sale in his damaged state, and charging the difference, along with the cost of keep and surgical attendance when the owner was trying to effect

(*a*) *Strackan & Gavin v. Paton*, 3 S. 259, affd. 3 W. & S. 19, 33. *The Risoluto*, L. R. 8 P. D. 109.

(*b*) *Mackenzie v. Liddell*, 10 R. 705.
(*c*) *The Argentino*, L. R. 13 P. D. 191.

a cure. The point generally contested is the extent of *onus* on the borrower. The rule which falls to be applied has been thus expressed: "If a person gets a horse, or indeed any article belonging to another, for use, on the contract of [loan or] hire, and brings back that animal or article much injured, he in whose custody or charge it was, must be able to discharge himself of the care he was bound to bestow on the property of the other, by showing that he was not to blame in regard to the cause of the injury, and must in the general case be able to show how the injury occurred" (*a*).

The reason of this rule is not far to seek. The owner commits his property to the borrower upon the implied undertaking that he will use it only for the purpose for which he receives it, and will observe due care in its use. If he brings it back damaged, the borrower cannot remain silent. In justice and good faith he should give some explanation of the time, place, and manner of the occurrence of the injury, and upon the explanation so given there arises the question, whether it is consistent with his being blameless in the matter. He must justify himself by proving the accident (*b*). If the horse has been returned, evidently overdriven, the presumption is that that was the cause of the injury (*c*). If while in his custody he was found loose in the stable with a lump on the shoulder, which might have proceeded from a kick from another horse, the facts indicate want of care, and form no justification (*d*). But if the horse, from some inherent weakness, has stumbled and fallen, the driver having at the time a tight hold of the reins, the explanation is consistent with his being free from blame, and *res perit suo domino* (*e*).

Sale of Goods.—Where a contract to deliver goods at a certain place is broken, the proper measure of damages is the

(*a*) *Pyper v. Thomson*, 5 D. 498.

(*d*) *Wilson v. Orr*, 7 R. 266.

(*b*) 1 Bell's Coms. (7th ed.) 484.

(*e*) *Strang v. Bain*, 26 S. L. Rep.

(*c*) *Robertson v. Ogle*, 23 June 187.

809, F. C.

difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser having the money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods to the market and obtain the current price for them (*a*).

These rules agree with the principle already adverted to, and which has been said to be sound sense as well as sound law (*b*), that it is incumbent on a person claiming damages to satisfy the Court that he has done nothing to aggravate the mischief, but has rather, so far as he had the means, done all in his power to avert or mitigate his misfortune. A servant dismissed and out of place is not entitled to go about idle and claim as damages wages and board-wages for the whole term. The contract having been broken, he is free to procure other employment, and his loss of time in seeking it is the loss he has sustained (*c*). It is for the convenience of both parties, and the practice is sanctioned by mercantile usage, that a buyer should go into the market and procure the goods of which he has been disappointed, or that the seller should sell against the defaulting purchaser and claim the difference, on receiving which he will be fully indemnified. No doubt it was at first denied that in Scotland such was the law, or indeed ought to be (*d*). In a case, comparatively recent, which went to the House of Lords, the buyer of a quantity of iron, who had failed to obtain delivery from the seller, was found entitled to damages at the rate of 15s. a ton,—the difference between 65s., the purchase price, and 80s. a ton,—although iron did not reach that price in the market till about a month after the breach. The Lord Chancellor, following *Watt v. Mitchell* (*e*), held that what was a suitable

(*a*) Per Tindal, C. J., in *Barrow v. Fletcher*, 10 M. 301; *Ross v. Arnaud*, 8 Q. B. 604, 610. *Pender*, 1 R. 352.

(*b*) *Moffat v. Park*, 5 R. 13.

(*d*) *Baird v. Reilly*, 18 D. 734.

(*c*) *Puncheon v. Haig*, M. 13990; (*e*) 1 D. 1157; *Dunlop v. Higgins*, *Hoey v. M'Ewan*, 5 M. 814; *Cameron* 6 Bell's Ap. 195.

reimbursement was exclusively for the jury—without reference to what was the ruling price in the market when the contract was repudiated, and he therefore declined to interfere with the verdict. These cases, however, have been since overruled, and with the approval of the House of Lords it was held that, when a buyer refused to take delivery, the seller's damages were limited to the difference between the contract price and the market price at the date of repudiation. The Lord President said: "A seller's right to charge against a buyer a loss upon a resale of goods cannot be properly exercised by a resale occurring three months after the breach of contract. That would be a very loose and inexpedient proceeding to sanction, and I am not aware that any such privilege of delay has been admitted. A seller is certainly not entitled to speculate either for himself or for any other party. He is not entitled to consider his own interest. He must resell, whatever the state of the market, and it is only if he immediately does so that he can charge the difference between the contract and the market price against the buyer. The true estimate must therefore be the difference between the contract price and what the goods would have brought if sold, [not in January, but] in November" (a).

"Setting aside," says Lord Blackburn (b), "all special damage, the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner. Now the value of the goods at the place of delivery must be the market price, if there is a market there for such goods. If there is not, either from the smallness of the place or the scarceness of the particular goods, the value at the place and time of delivery would have to be ascertained as a fact by the jury, taking into consideration various matters, including, in addition to the cost price and expenses of transit, the reasonable profits of the importer, which are adjusted by what is called the higgling and bargaining of the market." This profit may be shown by the profit receivable

(a) *Warin & Craven v. Forrester*, 4 R. 190, affirmed 4 R. (H. L.) 75. (b) *O'Hanlan v. G. W. Ry. Co.*, 6 B. & S. 484.

under a sub-contract, which, although not brought to the notice of the original vendor, may be put in evidence in order to show the real value of the goods (a).

The above are the damages which Professor Bell calls "the probable and manifest results of the transaction" (b). They are what might be expected to follow, and generally do follow; and they are called general damages to distinguish them from those special damages which could not have been foreseen, although in the special circumstances they have followed as the natural and proximate consequence of the wrongful act.

It is here that the second or supplementary rule for the assessment of damage, which has been already mentioned, comes into operation. The principle on which it rests was first clearly enunciated by an English Court of law in *Hadley v. Baxendale* (c). A shaft sent by a carrier to be repaired was delayed on its journey; and the carrier being sued for the damage caused by the mill standing idle for want of a shaft, the Court decided that, on the facts before them, the jury ought not to have taken such loss into consideration; for when no special circumstances were known to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might specially have provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be unjust to deprive them.

The Court therefore laid down the rule as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as (1) may fairly and reasonably be considered either arising naturally, *i.e.* according to the usual course of things, from

(a) Per Brett, M. R., in *Grébert v. Borgnis v. Nugent*, L. R. 15 Q. B. D. 85, 89. (b) 1 Bell's Coms. (7th ed.) 480. (c) 9 Ex. 341; 23 L. J. Ex. 179.

such breach of contract itself; or (2) such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

The principle here stated was not necessary to the decision of the question which was actually before the Court, and the terms in which it is expressed have been frequently commented on, but it has been practically accepted by our Court as a good working rule. In effect, it affirms that beyond the damages which might be expected to happen in the ordinary course of things no further liability is incurred, unless their occurrence was known to the defender himself to be the probable consequence of a failure on his part. They are not certain to happen: they are only likely to happen; and the jury do not require to find as a fact that they were in the contemplation of parties at the time. But the facts must be such as to satisfy the judge that the probability of the occurrence of loss through his default was present to the defender's mind, and it is then no longer open to him to object to the damages being assessed on the larger scale.

It is immaterial how this knowledge was derived—from the nature of the goods forming the subject-matter of the contract—the course of business, or the communications passing between the parties—provided the knowledge is brought home to the party sought to be charged under such circumstances as to entitle the other party to believe that the contract was accepted "with the special condition" (*a*). Thus a carrier who received for conveyance from this country to British Columbia the different parts of a sawmill, but who did not know that the whole would be useless if any one part failed to arrive, and that a missing part could only be replaced by sending home to England for it, was held liable to the consigners in the cost (with 5%) of replacing the lost goods, but no more (*b*). And where the vendor was aware that the goods

(*a*) Per Willes, J., in *British Columbia Sawmill Co. v. Nettleship*, L. R. 3 C. P. 499, 509.

(*b*) *British Columbia Co., sup.*

forming the subject of sale were wanted to complete a contract in Russia under penalties the amount of which was not mentioned, the Court found that the vendee was entitled to recover, not the penalties, in which owing to the vendor's failure they had been found liable, but a reasonable compensation for the delay; and as the penalties were not a heavy percentage, the verdict was allowed to stand (*a*). So, in an action for failing to forward a telegraph message, it was decided that as the message was in cipher, and conveyed no information to the defender as to its subject-matter, the damages must be nominal (*b*). The like was also held in a case arising out of a failure to furnish a steam derrick. The vendor in default was liable in the profit which would have been made by it when employed in the ordinary way; but not the larger sum which the purchaser would have made by using it in the special way he had intended, but of which the vendor was not informed (*c*).

It may be sometimes difficult to ascertain the damages, as when the loss claimed resulted from the failure of the defenders, a railway company, to deliver goods in time for exhibition at an agricultural show, and the jury gave a sum in name of profits (*d*). The Court assumed that the pursuer would make some profit, and as his object in sending the goods was known to the defenders, he was allowed to keep his verdict. Where the defender's fault consisted in his failing to deliver a steam thrashing-machine to thrash a field of wheat, and another machine was not procurable, the pursuer was entitled to damages for the cost of stacking the grain, its deterioration by rain, and the expense of kiln-drying it; but not damages for the fall of the market (*e*). In this case the defendant knew that the plaintiff's custom was to thrash in the field.

Breach of Warranty in Sale. — When the goods sent to a

(*a*) *Elbinger Actien Ges. v. Armstrong*, L. R. 9 Q. B. 473.

(*b*) *Sanders v. Stuart*, L. R. 1 C. P. D. 326.

(*c*) *Cory v. Thames Ironworks Co.*, L. R. 3 Q. B. 181.

(*d*) *Simpson v. L. & N.-W. Ry. Co.*, L. R. 1 Q. B. D. 274.

(*e*) *Smced v. Foord*, 1 E. & E. 602.

buyer are not conform to contract, and the defect is discoverable, it is his duty to return them; and failure to do so bars any claim of damages (*a*). If it is undiscoverable, *e.g.* where seed barley is warranted to be of a particular description and the crop is different, the measure of damages is the difference in value between the crop produced and the crop which would have been produced from genuine seed (*b*).

The value to the purchaser of the thing purchased, compared with the value of what should have been furnished, is the measure of his loss. This rule was also applied in regard to a ship, which, although of the stipulated dimensions, was found on trial not to possess the carrying capacity promised by the builders. The Court said the purchaser was entitled to the difference between the earning powers of the ship contracted for and the ship furnished (*c*).

With respect to cattle sold when suffering from infectious disease, the seller is taken to know that in the ordinary course of business they will be placed beside others. If he knew of the disease, he is liable in all the damage which may be the consequence in respect of the fraudulent misrepresentation (*d*); and if there has been no fraud, but only a warranty, the seller is liable on the breach of it, not only in the value of the beast forming the subject of the sale, but the injury done to the rest of the herd through the infection (*e*).

Where there is a Sub-sale.—If the buyer informs the seller that he wants the article which he is buying in order to enable him to fulfil another contract, and the seller, failing to deliver, forces him into a breach of contract with the subvendee, the liability so incurred is part of the damages due from the seller. This is one of the cases which the rule in

(*a*) *Carter v. Campbell*, 12 R. 1075; *Smith v. Waite, Nash, & Co.*, 800.

15 R. 533.

(*b*) *Randall v. Roper*, 27 L. J. 559.

Q. B. 266.

(*c*) *Gillespie v. Howden*, 12 R.

800.

(*d*) *Mullet v. Mason*, L. R. 1 C. P.

559.

(*e*) *Smith v. Green*, L. R. 1 C. P. D.

Hadley v. Baxendale was intended to meet. The vendor knowing that performance of the sub-contract depends on performance of his contract—which if kept there will be a profit, but if broken there will be no profit but a loss—must be taken to have had the seller's damage in his contemplation at the time. His only defence is that it was in the vendee's power to procure the goods elsewhere, and that it was his duty to do so and sue him for the difference. If there is a market, he is bound to do so; but often it happens there is none, to which either the vendee or sub-vendee can resort; and in that case he may purchase goods as near in quality as possible, though slightly superior, to fulfil the sub-contract, and charge the defender with the difference in cost (*a*).

If this again is impossible, the person originally in default is then subjected to the entire liability. Thus where the plaintiff, a fur merchant in Paris, came over to this country to buy sheep-skin rugs in order to supply a customer of his in Paris, and the maker, although informed of his object, failed timeously to supply them, with the result that the plaintiff was condemned by the Tribunal of Commerce in damages; the Court found him entitled to the profit which he had lost as well as the damages in which he had been cast (*b*).

In such a case the limit of liability is manifest. The pursuer cannot claim more than he was bound to pay. An employer, sued for damages by a workman injured by the breaking of a chain, settled the action by accepting liability, and claimed to be reimbursed by the maker of the chain, who, he said, had been duly informed of the purpose for which it was required. But the Court held that as the workman's case was groundless,—the master being free from blame,—the action was unfounded (*c*).

The case cited proceeded on the fact that the particular

(*a*) *Hinde v. Liddell*, L. R. 10 Q. B. 265. (*c*) *Ovington v. M'Vicar*, 2 M. 1066. Except, possibly, for the value of the chain.
 (*b*) *Grébert Borgnis v. Nugent*, L. R. 15 Q. B. D. 85.

sub-contract was fully explained to the seller. But it seems to be enough if the seller knows generally how the goods were to be disposed of, and the reason why a warranty was asked. Defendant, a coal merchant, sold coal of a certain kind to shipping agents, knowing at the time when the contract was made that they were buying it for resale to steamships, which it was not fit for; but the defect only became apparent when used on board ship. The defenders were found entitled to recover as damages the damages in which they had been found liable, as well as the costs in defending the action (a).

As far as costs are concerned, this judgment agrees with the view which was taken in Scotland in an early case, where in an action against the executors of a proprietor of an entailed estate by a lessee, on account of the lease having been set aside, the pursuer was found entitled to the value of the lease as well as his costs in defending it (b). The costs are part of the damages, if it was a reasonable thing for the party to defend, —which may be a question of circumstances. If the seller advises him not to defend, there is no excuse for his doing so; if he insists that the goods are up to contract, and he may do as he thinks proper, he will be entitled to the costs reasonably incurred as part of his damages (c).

Contract by non-authorized Agent.—A person professing to act as an agent is assumed to warrant that he has authority to bind his principal; and if he has not, the measure of damages is what the pursuer has lost by losing the contract which he had made. It is not, however, the value of the verdict which he might have recovered in an action for breach of contract against the principal, for then the agent of an insolvent would be bound to pay as much as the agent of one not insolvent. The pursuer expected a binding contract, and he has been disappointed; how far it was a valuable contract must

(a) *Hammond & Co. v. Bussey*,
L. R. 20 Q. B. D. 79.

(b) *Innes v. Lord Peterboro's Exrs.*,
4 Mur. 432.

(c) *Hammond & Co. v. Bussey*, *sup.*

depend on the character of the proposed principal and other considerations. He recovers the value of the contract along with his costs in seeking to enforce it, if these were reasonably incurred (*a*).

Actions against Carriers.—If goods are sent by a carrier to be sold in a particular market,—beasts to Smithfield, or fish to Billingsgate,—and the object of the sender is either specially brought to the notice of the carrier, or in the circumstances ought in reason to have been inferred, and they do not arrive in time for the market, damages for the loss of the market may be recovered. The same holds in regard to goods for the purpose of being sold in a particular season, and generally as to consignments which, it is known to both parties, will command a higher price if they arrive by a given day than at a later time. This rule applies to carriage by land, where there is a regular course of conveyance, and the carrier is answerable for any undue delay in the transit, even when caused by an accident which he cannot show could not have been avoided by ordinary care and foresight on his part (*b*). But the case of goods sent for a long distance by sea is different. They are not sent like goods on land for immediate sale on their arrival. They may be sold before they arrive, or perhaps not for some time after they do arrive. It all depends on the merchant's view of the market. It has therefore been held that when a vessel is sunk in a collision, or the voyage is protracted owing to defects in the ship, the owner of the cargo is not entitled to damages for loss of market (*c*).

(*a*) *Collen v. Wright*, 7 E. & B. 301, 8 E. & B. 647; *Nat. Coffee Palace Co. ex parte Panmure*, L. R. 24 Ch. D. 367.

(*b*) *Anderson v. N. B. Ry. Co.*, 2 R. 443.

(*c*) *The Parana*, L. R. 2 P. D. 118. *The Nottingham*, L. R. 9 P. D. 105.

APPENDIX.

—o— OUTLINE FORMS OF PLEADINGS.

IN the Supreme Court the action originates with a Summons, as follows:—

VICTORIA, Etc. — Whereas it is humbly meant and shewn to us by our lovite A. B.,—*Pursuer*; against C. D.,—*Defender*; in terms of the Condescendence and Note of Pleas in Law hereunto annexed: Therefore the defender Ought and Should be Decerned and Ordained, by decree of the Lords of our Council and Session, to make payment to the pursuers of the sum of £500 sterling; together with the sum of £100 sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon; conform to the laws and daily practice of Scotland used and observed in the like cases, as is alleged.—OUR WILL IS HEREOFRE, etc.

When the action is raised in the Sheriff Court, the initial writ is in the following form; but in both Courts the Condescendence, Defences, and Pleas in Law are now in form substantially the same:—

PETITION.

In the Sheriff Court of the Sheriffdom of the Lothians and Peebles at Edinburgh.

A. B., residing at Street,
Leith, — *Pursuer*; against C. &
D., Engineers and Shipbuilders,
Leith, — *Defenders*.

The above-named pursuer submits to the Court the condescendence and note of pleas in law hereto annexed, and prays the Court

To grant a decree against the above-named defenders, ordaining them to pay to the pursuer the sum of £300 sterling [or alternatively to pay to him the sum of £117 sterling] (*a*), with interest thereon, at the rate of five per centum per annum, from the date of the decree to follow hereon, till payment, and with expenses, and also to grant warrant to arrest on the dependence.

According to Justice,
E. F.,
Pursuer's Agent.

“Every action in the ordinary Sheriff Court shall be commenced by a Petition in one of the forms as nearly as may be contained in the Schedule A annexed to this Act, in which the pursuer shall set forth the Court in which the action is brought, his own name and designation, and the name and designation of the defender, and the prayer of the Petition, without any statement whatever of the grounds of action. There shall be annexed to the Petition a statement (in the form of an articulate condescendence) of the facts which form the grounds of action and a note of the pursuer's pleas in law, which condescendence and note of pleas shall be held to constitute part of the Petition. The statement of facts shall be made succinctly and without quotation from documents, except where in-

(*a*) This is inserted when the action is by a workman against his employer, and is laid at common law and under the Employers' Liability Act.

dispensable" (39 & 40 Vict. c. 70, sec. 6).

"The defences shall be in the form of articulate answers to the condescendence, and shall have appended thereto a note of the defender's pleas in law, and, where necessary, a statement of facts on which the defender founds in defence. The statement of facts and answers shall be made succinctly, and without quotation from documents, except where indispensable" (*Ib.* sec. 16).

In actions of damages a separate statement is rarely necessary, and at adjustment the pursuer makes such admissions or denials as will raise the issue for trial. (See Wilson's Sheriff Court Pr. p. 158.)

A statement of the "facts" forming the ground of action does not mean a recital of the evidence by which it will be proved, or from which it may be inferred. The case (if relevant) is tried on the proof which follows; and in modern practice the only function of the record is—(1) To tie the pursuer down to a definite ground of action; and (2) To give his adversary reasonable notice of the nature of the case which he has to meet. It is only by careful attention to this principle that prolix and obscure pleading is to be avoided.

One reason why a pursuer in bringing his case before the Court need not go into matters of evidence is, that until defences are lodged, he cannot tell what facts are to be traversed and what not, and till issue is joined he need not trouble himself about evidence. It has been properly observed, that in determining whether a pleading fairly discloses the nature of the case intended to be proved, it must be considered whether the matter charged be or be not within the knowledge of the party charged (*a*). Another remark by the same judge agrees with general experience, namely, that pleadings should be so framed as to assist not only the party in his statement of the case, but also the Court in investigating the truth between

(*a*) Sir R. Phillimore in *The Freezon*, L. R. 2 Ad. & E. 349.

the litigants (*a*). But between the fact or facts constituting the wrong alleged and the evidence from which they may be inferred, the distinction is obvious, and it is only the "facts," stated "succinctly" and without detail, which the statute requires (*b*).

I.—ASSAULT.

CONDESCENDENCE IN COMMON ASSAULT.

COND. 1. On the 1st May 1888, in King Street, Aberdeen, the defender attacked and assaulted the pursuer by beating him about the head and shoulders.

COND. 2. The pursuer was injured in his person, and has incurred expense for surgical and medical attendance, amounting to £10, and he claims £50 of damages. As the defender refuses to make compensation, this action has become necessary.

Plea in Law.

The defender is liable in damages for said assault.

In respect whereof.

THE DEFENCES.

DEF. 1. Denied. The pursuer was himself the aggressor, and the defender only struck in self-defence.

DEF. 2. Denied. The pursuer accepted £5 and an apology in discharge of his claim.

Pleas in Law.

1. The defender having committed no assault, is not liable.

2. In respect of the foresaid discharge, the defender should be assoltized with costs.

[At adjusting, the pursuer adds to each article of his condescendence, "Counter statement denied."]

II.—ASSAULT BY SCHOOL-MASTER.

COND. 1. On 5th August 1880, the defender, in Saint Peter's Grammar School, made a violent assault on the pursuer, A. B., and severely

(*a*) Sir R. Phillimore in *The Why Not*, L. R. 2 Ad. & E. 265.

(*b*) See on this rule of pleading generally the remarks of James, L. J., L. R. 7 Ch. D. 473.

beat him about the face, head, and back with a thick stick. The pursuer A. B. is eleven years of age, and resides with his father, the pursuer C. B., who is his guardian.

COND. 2. The said A. B. has been severely injured in his person, and for six weeks was confined to bed. The said C. B. has incurred £20 for medical attendance and £10 for nursing, and they claim, etc.

Plea in Law (as before).

DEFENCES.

DEF. 1. Denied. The defender is master of St. Peter's Grammar School. The pursuer was a pupil. He was guilty of such gross insubordination as made it necessary to punish him, and the punishment inflicted was reasonable and proper.

DEF. 2. Denied.

Pleas in Law.

1. The defender not having been guilty of an assault, is not liable.

2. The defender not having exceeded the reasonable correction belonging to him as a schoolmaster, is not liable.

[At adjusting, the pursuer will add to article 1 of the condescendence that the counter statement is denied, except that A. B. was the defender's pupil.]

III.—BREACH OF PROMISE AND SEDUCTION.

COND. 1. The pursuer became acquainted with the defender in March 1884, shortly after which he asked her to be his wife, and she agreed to marry him within a reasonable time, which elapsed before the action was brought.

COND. 2. The pursuer, relying on the said promise, permitted the defender to have carnal intercourse with her, and on 20th April 1885 she gave birth to a male child of which he is the father.

COND. 3. Thereafter he refused to marry her, and she has thus been seduced by the defender. She has suffered in her health and feelings, and has otherwise incurred loss and damages. She gave up a situation as dressmaker, which was worth £100 a year; was put to expense in pre-

paring for the marriage, amounting to £30; her claim for inlying expense is £2, and she is entitled to aliment at the rate of £5 per annum. She also claims £500 damages, etc.

Pleas in Law.

1. The defender having promised and engaged to marry the pursuer and wrongfully refused to marry her, is liable in damages.

2. The pursuer is also entitled to decree for inlying expenses and aliment as concluded for.

[In this action the seduction is pleadable as matter of aggravation.]

When the action is founded on the seduction simply, the pursuer requires to condescend on the form of the deceit which was used to lead her astray, or allege a relationship entitling her to the defender's protection, *e.g.* guardian and ward, master and servant, etc. Where both parties are equally guilty, no action lies, therefore the pursuer has to aver and prove either fraud or *culpa*. Thus—

The pursuer became intimate with the defender in May 1888, and by continued attentions, and honourable professions of love for her, gained her affections, and prevailed on her to permit him, in August 1888, to have carnal connection with her; or—

The pursuer in May 1888 entered the defender's service as a female domestic, and the defender in breach of his duty took advantage of his position to debauch and seduce her while in his service, with the result that she gave birth, etc. (See 1 Fraser, *Husb. and Wife*, 501-4.)

DEFENCES.

DEF. 1. The promise is denied; [or] Defender was exonerated by the pursuer from the alleged promise at Christmas 1884; [or] When the defender made the alleged promise he was not aware, nor was he aware until 1st Nov. 1884, that as the fact was, the pursuer had borne an illegitimate child in 1881.

DEF. 2. Denied.

DEF. 3. Admitted that the defender refuses to marry the pursuer. *Quoad ultra* denied.

Plea in Law.

The defender having made no such promise as is alleged, ought to be assolizied ; or,

The defender having been released from his said promise is not liable ; or,

The defender is entitled for the reason stated to refuse to marry the pursuer.

[At adjusting, in this and all the subsequent forms, the pursuer will add reply to counter statement.]

IV.—NEGLIGENCE.

I. RECKLESS DRIVING.

COND. 1. On the 15th Jan. 1882 the defender by his servant negligently drove a horse and cart in Union Street, Aberdeen, so that it came into collision with the pursuer's carriage, which was upset and damaged, and the pursuer injured.

COND. 2. The pursuer has incurred the following accounts:—Coach-maker, £15; for surgical and medical attendance, £10; and he claims, etc.

Plea in Law.

The said collision having occurred through the fault of the defender, he is liable in damages.

DEF. 1. The collision is admitted ; but it is denied that it was due to the fault of the defender. Further, the pursuer was guilty of contributory negligence, being at the time on the wrong side of the road, and by the exercise of ordinary care he could have avoided the injury.

DEF. 2. Denied.

Plea in Law.

1. The defender not being to blame, is not liable.

2. The pursuer having been guilty of contributory negligence, the defender should be assolizied.

[Another Form.]

COND. 1. On the 10th Jan. 1887 the defender had a horse and cart in Union Street, Aberdeen, under charge of A. B. his servant, which the said A. B. negligently left unattended, and the said horse started off and knocked down the pursuer.

COND. 2. The pursuer was severely injured, and claims, etc.

DEF. 1. Denied.

DEF. 2. Denied.

II. BY A WORKMAN AGAINST HIS EMPLOYER AT COMMON LAW.

COND. 1. On the 3rd Feb. 1887 the pursuer was working as a mason in the defender's employment in the erection of a house at _____ in the parish of _____.

COND. 2. When the pursuer was working on a scaffold the same gave way, and he was thrown to the ground and had his leg broken, owing to the negligence of the defender in providing timber for the said scaffold, which was rotten and insufficient.

COND. 3. The pursuer claims £150 damages, etc.

Plea in Law.

The pursuer having been injured through the defender's negligence, is entitled to compensation.

DEF. 1. Admitted.

DEF. 2. Denied that the accident was due to the fault of the defender.

Plea in Law.

The defender not having been in fault, is not liable.

III. UNFENCED MACHINERY.

COND. 1. On or about the 26th Sept. 1883 the pursuer's son, John Magee, while in the employment of the defenders in the starching and mangling room of the factory at Lennox Mills, Lennoxtown, was caught by a horizontal shaft and killed.

COND. 2. It was the duty of the defenders to have fenced the said shaft in terms of the Act 41 & 42 Vict. c. 16 [or if at common law omit Act, and say—as without protection it was unsafe and dangerous], and if it had been so fenced the accident would not have happened. But it was unfenced at the time, and the death of the pursuer's son was thus caused by the fault of the defenders.

COND. 3. The pursuer claims damages both at common law and under the Employers' Liability Act—at common law, £1000; under the Act, £100. (See *Magee v. Dalgleish, Falconer, & Co.*, 11 R. 857.)

[Add Pleas in Law.]

[Where the action is founded on the defective condition or arrangement of the plant, premises, etc., conducing to the accident, the condescendence should set forth specifically in what respect it was defective or insufficient. *Morison v. Baird*, 10 R. 271; *M'Kinlay or Waterston v. Murray & Co.*, 11 R. 1036.]

IV. FOR DEATH RESULTING FROM INSUFFICIENT TACKLE.

COND. 1. The pursuer is the widow of the deceased Richard Welsh, who was for some time in the service of the defender as a labourer. While employed by him in tearing up and lifting rails from a railway near Cowden Colliery by means of a travelling crane, on the morning of the 27th March 1886, the said Richard Welsh, along with some of his fellow-workmen, was engaged turning the handle of the said crane, which had fastened to its hooks a rail thirty feet in length, when the point on which the end of the main beam or shaft of said crane turned, broke, and the jib or stays thereof fell and struck the said Richard Welsh on the back and killed him.

COND. 2. The crane broke in consequence of its being unable to bear or resist the strain to which it was necessarily subjected in attempting to tear up and lift the rails and sleepers, which was beyond that which such a crane is able and intended to bear. This was known to, or ought to have been known by, the defender, and was unknown to the deceased, who was ignorant of the capabilities of said crane, and of the strain put upon it in lifting the said rails. The defender, in so supplying the said crane to be used for a purpose for which it was unsuited, was guilty of negligence, and it was in consequence thereof that the said accident happened.

COND. 3. At the time the accident occurred, the said Richard Welsh was earning wages at the rate of twenty-three shillings weekly, which is the rate allowed in the district to persons similarly employed. Three

years' earnings at that rate amount to £180.

COND. 4. The defender has been repeatedly applied to for compensation for the loss, injury, and damage sustained by the pursuer, but has declined to make any compensation, and the present action is rendered necessary. The action has been raised to recover compensation at common law and under the Employers' Liability Act, 1880, notice having been duly given to the defender in terms of said Act.

Pleas in Law.

1. The accident having been caused through the fault of the defender, and the pursuer having, in consequence of said accident, suffered loss, injury, and damage as condescended on, she is entitled to compensation.

2. The said Richard Welsh having, while in the employment of the defender, lost his life through the fault of the defender in supplying a defective crane, and knowingly or negligently allowing it to be used for a purpose for which it was not designed, and for which it was unsuited, the pursuer, as his widow, is entitled to compensation for the loss, injury, and damage sustained by her.

3. In the circumstances, the pursuer is entitled to decree as prayed for, with expenses.

[Another Form.]

COND. 1. The pursuer was a labourer in the employment of the defenders at their works at Uphall, where they manufacture shale and other mineral oils on an extensive scale. His average weekly wage while in the defenders' service was 30s.

COND. 2. At the defenders' said works there are furnaces or retorts which are supplied with steam from a steam boiler, and the surplus steam discharges itself into a tub sunk in the ground at the end of the platform on which the retorts-men stand when attending to the retorts. The said tub is not in any way fenced or covered, although it was the duty of the defenders to have had this done.

COND. 3. The pursuer's duty was to attend to the furnaces or retorts, and on or about the 20th of January 1885, while engaged in doing so, he fell into the tub, which was at the time enveloped by thick clouds of steam and concealed from view. He was severely scalded; and if it had been properly fenced by the defenders, the accident would not have happened.

COND. 4. The pursuer's right leg and foot were severely scalded and burned, and otherwise seriously injured, he has endured great suffering, and has since the accident been confined to bed under medical treatment.

COND. 5. The said injury to the pursuer occurred through the negligence of the defenders, or of the manager, foreman, or other person in their employment entrusted by them with the management or superintendence of the ways, works, machinery, or plant within their said works, in failing to cover, and keep covered, the said tub or other vessel, or in failing to fence round the said tub or vessel in such a way and manner as would have prevented the occurrence herein before condescended on, to all of whom the defective condition of the said ways, works, machinery, or plant, and in particular the unsafe condition of the said tub or vessel, was well known.

COND. 6. The sum sued for is reasonable compensation for the injury and damage sustained by the pursuer. His estimated earnings during the three years preceding the date of the said accident amount to £234.

COND. 7. The pursuer within the period of six weeks immediately succeeding the accident caused notice to be given to the defenders, in terms of the Employers' Liability Act, that he was injured in the manner above described, and applied for compensation.

Pleas in Law for Pursuer.

1. The injuries sustained by the pursuer having been caused by the fault or negligence of the defenders, or of those for whom they are responsible, the pursuer is entitled at

common law to compensation from them, with expenses.

2. The pursuer, having sustained injury through the defective condition of the ways, works, machinery, or plant, connected with or used in the business of the defenders, is entitled, under the Employers' Liability Act, to compensation, with expenses.

Pleas in Law for Defenders.

1. The pursuer's statements being unfounded on fact, the defenders should be absolved.

2. The accident in question to the pursuer not having been due to the fault of the defenders, or those for whom they are responsible, the defenders are entitled to absolvitor, with expenses.

3. The said accident having been caused, or at least materially contributed to, by the carelessness and negligence of the pursuer himself or a fellow-workman ordinarily engaged in manual labour, the defenders are entitled to absolvitor, with expenses (a).

4. In any event, the damages claimed are excessive.

V.—RAILWAY ACCIDENTS.

LEVEL-CROSSING.

COND. 1. On or about the 31st December 1881 the pursuer's son, James Ireland, was killed at a level-crossing, at or near Largo, by a train belonging to the defenders, through their fault.

COND. 2. It was the duty of the defenders to have taken due precautions for the safety of persons crossing the line at the said crossing; but they were guilty of a breach of their duty, in the following particulars, namely — (1) The fencing of the line at the crossing was defective; (2) the person in charge of the crossing knew that the train past due had not passed, and yet gave no warning to the boy when she saw him cross; (3) there was no light; (4) the train was travelling at an unusual speed, and gave no warning of its approach,

(a) If this plea is to be stated, the facts on which it is founded must be stated in the defences.

and in consequence the life of the pursuer's son was sacrificed to the negligence of the defenders.

["If the pursuer's case is relevant, it is our practice to send the cause to trial on all its facts without determining which of the averments are sufficient in themselves, or deciding on the relevancy of each fact stated separately."] Per I. J.-C. Moncreiff in *Ireland v. N. B. Ry. Co.*, 10 R. 53.

VI.—DEFAMATION.

I. UNPRIVILEGED LIBEL.

COND. 1. The pursuer is a physician and surgeon practising at A. in the county of B.

COND. 2. The defenders are the printers and publishers of a newspaper called the *Eatonswill Gazette*, and in the number thereof of 1st August last, falsely, calumniously, and maliciously printed and published of and concerning the pursuer the words following, viz. [quote], meaning thereby and imputing to the pursuer, etc.

Plea in Law.

The defender is liable in damages for the false and calumnious words maliciously printed and published as aforesaid.

DEF. 1. Admitted.

DEF. 2. The defender neither printed nor published the alleged libel; [or]

The said words in no way referred to the pursuer; [or]

The said words did not convey the meaning which the pursuer places on them; [or]

The said words formed part of an article printed and published by the defender as a public journalist, and said article was printed and published *bona fide* and without malice, and for the public good, as a fair comment on a matter of public interest; [or]

The defender admits that he published the said words as alleged, but he denies that he published them maliciously. The occasion of the publication was privileged [state how; or]

The said words are true in substance and fact.

[*Plea in Law.*]

II. FOR COMMON SLANDER.

COND. 1. On or about the 10th January 1884, within the shop of David Brown, Reid Street, Inverness, the defender, in the presence and hearing of A., B., C., and D., falsely, calumniously, and maliciously spoke and published of the pursuer in the Gaelic language the words following, namely [set out the defamatory words], which said words as translated into English bear, and were understood by the persons above named to bear, the meaning following, namely [follows translation].

The defender did thereby mean and impute that the pursuer at the time of speaking said words was, etc. [setting out the innuendo, etc., when an innuendo is necessary].

III. SLANDER OF A MAN'S TRADE.

COND. 1. The pursuer was for many years, and still is, a manufacturer of soda-water in Dundee.

COND. 2. On or about [date], within [place], the defender falsely, calumniously, and maliciously spoke and published of the pursuer in relation to his said trade and business as aforesaid the words following, namely [setting them out], meaning thereby [innuendo].

COND. 3. The said words were spoken and published in the presence and hearing of [naming them, with address sufficient for identification], and were understood by them in the sense above expressed.

[*Plea as above.*]

IV. AGAINST A NEWSPAPER FOR A SERIES OF ATTACKS.

COND. 1. The pursuer, the Rev. A. B., is minister of the parish of C., and the defender D. is proprietor, printer, and publisher of a newspaper published in C. under the name of the *C. Herald*.

COND. 2. In 1865 a movement was commenced in the pursuer's congregation for the introduction of an organ; and in the course of the discussion which followed there appeared in said newspaper several articles evincing strong feelings of animosity and malice against the pursuer.

COND. 3. In particular [setting out the offensive passages].

COND. 4. The whole of said articles falsely and calumniously and maliciously represent and insinuate that the pursuer [setting out the innuendo].

COND. 5. Further, the articles above referred to not only contain the above-quoted passages, but other false and calumnious passages of and concerning the pursuer; and the whole of said articles, whether taken separately or together, tended, and were intended, to hold up the pursuer to the ridicule, contempt, and hatred of his congregation and the public, and were part of a systematic plan carried on by the defender to destroy the pursuer's character and usefulness as a Christian minister. He has thereby suffered greatly in his feelings and reputation, and this action has become necessary

Pleas in Law.

1. The defender having slandered the pursuer as alleged, is liable in damages.

2. The articles libelled, whether taken separately or together, being calculated and intended to hold the pursuer up to ridicule and contempt, and having had that effect, he is liable in damages.

Pleas in Law for Defender.

1. The action is irrelevant.

2. The defender not having slandered the pursuer, ought to be assolized.

3. The articles in defender's paper not having exceeded the bounds of fair criticism on a public subject in a public journal, the defender is not liable in damages.

4. The averments of the pursuer being unfounded, the defender is entitled to absolvitor.

ISSUES.

The issue must be contained in the record (*Smith v. Green*, 15 D. 549), but it is unnecessary to put all that is in the record in the issue (*M. Bride v. Williams*, 7 Mac. 427). In former times the issues were very special; but since *Duff v. E. of Fife*, in the

House of Lords (1 Sh. App. 498), the terms used have been more general, and now they are as free from detail as possible. It is found that there is no harm in this, because the case for both parties is in the record, and the judge has a copy of it before him at the trial, "for the purpose of preventing either party from endeavouring to make a case at the trial which they had not stated on record. That is certainly one of the great functions of the record as settled by the Judicature Act of 6 Geo. IV. c. 120, although this has often been misunderstood" (Lord President Inglis in *Macfarlane & Co. v. Taylor & Co.*, 6 M. H. L. 4; *Mackintosh v. Smith*, 2 M. 1261).

I.—ASSAULT.

Whether on or about the 15th June 1887, the defender, in or near Nithsdale Road, Strathbungo, assaulted the pursuer, to his loss, injury, and damage?

II.—BREACH OF PROMISE OF MARRIAGE.

Whether in or about the months of September, October, or November 1886, the defender promised and engaged to marry the pursuer; and whether the defender has wrongfully failed to implement the said promise and engagement, to the loss, injury, and damage of the pursuer?

III.—SEDUCTION.

Whether in the course of the period betwixt May 1876 and May 1877, the defender courted the pursuer and professed honourable intentions towards her; and whether by means of such courtship and professions the defender seduced the pursuer, and prevailed on her to permit him to have carnal connection with her, to her loss, injury, and damage? (a).

IV.—NEGLIGENCE—COACH ACCIDENT.

Whether in or near the village of Kinglassie, on or about the 27th day of October 1887, the pursuer,

(a) *Gray v. Brown*, 5 R. 971.

while being driven in a waggonette from Lochgelly to Buckhaven, suffered injuries in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer?

V.—RAILWAY ACCIDENT.

Whether on or about 18th March 1886, while travelling as a passenger between Charing Cross and Dumbarton Stations, on the Glasgow City and District Railway, then being worked by the defenders, the pursuer was injured in his person through the fault of the defenders, to his loss, injury, and damage?

VI.—ACTION BY SERVANT AGAINST A STRANGER.

Whether on or about 17th November 1887, the pursuer, while in the employment of Archibald Coats, tenant of the Retreat Shootings at Lochlee, Forfarshire, was injured in his person through the fault of the defender, to the pursuer's loss, injury, and damage?

VII.—MASTER AND SERVANT.

Whether on or about the 24th day of May 1887, and within or near the defenders' Locomotive Works at St. Rollox, Glasgow, the pursuer, while in the employment of the defenders, was injured in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer?

VIII.—MASTER AND SERVANT —PIT ACCIDENT.

Whether on or about the 1st day of February 1887, within or near the Lochinch pit, Pollok Colliery, the pursuer's son, the deceased Walter Macfarlane, while in the employment of the defender, was killed through the fault of the defender, to the loss, injury, and damage of the pursuer?

The following is another form :—

Whether on or about 30th November 1887, the deceased John Russel, while in the employment of the defenders, at their Oil Works at Deans, near Bathgate, sustained injuries from which he died, through

the fault of the defenders, to the loss, injury, and damage of the pursuer?

Another form, in which the immediate cause of the injury is set out, is :—

Whether on or about the 12th day of October 1886, within a coal pit belonging to the defenders, situated at or near Rutherglen Road, Glasgow, the pursuer's son, James Malcolm, while in the defenders' employment, suffered injuries in his person by a portion of the roof of said pit falling upon him, in consequence of which he died, through the fault of the defenders, to the loss, injury, and damage of the pursuer?

IX.—AT COMMON LAW AND UNDER THE EMPLOYERS' LIABILITY ACT.

In the following case the action originated in the Sheriff Court, and being advocated with a view to jury trial, the issue was adjusted by the Second Division as follows :—

Issue for pursuers and appellants for the trial of the cause in which Mrs. Cecilia Dewar or Trail, residing at Oliphant Terrace, Kirkcaldy, in the county of Fife, relict of John Trail, mason, who resided in Kirkcaldy, as an individual; James Trail, Thomas Trail, and Isabella Trail, children of the said deceased John Trail, and residing at Oliphant Terrace, Kirkcaldy, aforesaid; and the said Mrs. Cecilia Dewar or Trail, as guardian and tutor, and as representing William Trail, Margaret Trail, Jane Trail, Betsy Trail, Jessie Trail, and George Clark Trail, all pupil children of the said deceased John Trail, and residing with their mother, the said Mrs. Cecilia Dewar or Trail, at Oliphant Terrace, Kirkcaldy, aforesaid, are *Pursuers and Appellants*; and William Kelman & Company, builders, No. 66 High Riggs, Edinburgh; and William Kelman, No. 66 High Riggs aforesaid, the only known partner of said firm of William

Kelman & Company, are *Defenders and Respondents*.

Whether, on or about the 3rd day of November 1886, John Trail, the husband of the pursuer, Cecilia Dewar or Trail, and father of the other pursuers, was, while in the employment of the defenders, at or near Royston Terrace, Inverleith Row, Edinburgh, killed through the fault of the defenders, to the loss, injury, and damage of the pursuers?

Damages laid as follows:—

At common law.

To the pursuer, Cecilia Dewar or Trail, . . .	£500
To the pursuers, James, Thomas, and Isabella Trail, £250 each, . . .	750
To the pursuer, Cecilia Dewar or Trail, as representing the said pupil children, . . .	1500

Under the Employers' Liability Act, 1880.

To the pursuers, according to their respective rights and interests, . . .	£246
--	------

Edinburgh, 22nd October 1887.—
Authenticated as the issue for the trial of the cause.

MONCREIFF, *I.P.D.*

X.—DEFAMATION.

It being admitted that the defender caused an advertisement to be published in the *Dumfries and Galloway Courier and Herald* of the 22nd October 1887, and an advertisement to be published in the *Dumfries and Galloway Saturday Standard* of the 22nd October 1887, in the terms set forth in the schedule hereunto annexed—

Whether said advertisements are of and concerning the pursuer, and falsely and calumniously represent the pursuer as a person who had stolen or fraudulently appropriated, or caused to be missing, a pearl and emerald ring which belonged to the deceased Mrs. Rachel Wilkin or Scott, at one time wife of William

Scott, doctor of medicine, Dumfries, also now deceased; or contain a representation of and concerning the pursuer to the like effect, to the loss, injury, and damage of the pursuer?

[Defamatory matter set out in schedules appended.]

XI.—FALSE ACCUSATION.

1. Whether on or about the day of _____, and in or near defender's house, St. Baldred's Tower, North Berwick, the defender did falsely and calumniously, maliciously, and without probable cause, state to Police-Constable _____ that the pursuer had stolen a suit of livery from him, or use or utter words of and concerning the pursuer of similar import and effect, to his loss, injury, and damage?

2. Whether on or about the 18th day of May 1887, and in or near the defender's house, St. Baldred's Tower, North Berwick, the defender did falsely and calumniously, maliciously, and without probable cause, state to Police-Sergeant Paterson, North Berwick, that the pursuer had stolen a suit of livery from him, or use other words of and concerning the pursuer of similar import and effect, to his loss, injury, and damage?

3. Whether on or about the 6th June 1887, the defender wrongfully, maliciously, and without probable cause, caused the pursuer to be apprehended and examined before Sheriff-Substitute Shirreff on a charge of theft, to his loss, injury, and damage?

XII.—ORDINARY SLANDER.

Whether on or about _____, in the house in Stirling, then occupied by _____

and in presence of _____, the defender did falsely and calumniously say of _____ and concerning the pursuers, that they were drunken blackguards, or used words to that effect, to the loss, injury, and damage of the pursuers?

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

(*Orders in Council, 11th August 1884, 30th December 1884,
24th June 1885.*)

By an Order in Council, dated the 11th day of August 1884, the following Regulations, issued, in pursuance of the Merchant Shipping Act Amendment Act, 1862, on the joint recommendation of the Admiralty and the Board of Trade, were appointed, from 1st September 1884, to be substituted, so far as regards British ships and boats, for the Regulations contained in the Order in Council of the 14th day of August 1879:—

Art. 1. In the following rules every steamship which is under sail and not under steam is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

Rules concerning Lights.

Art. 2. The lights mentioned in the following Articles, numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11, and no others, shall be carried in all weathers, from sunset to sunrise.

Art. 3. A seagoing steamship when under way shall carry—

(a) On in front of the foremast, at a height above the hull of not less than 20 feet, and if the breadth of the ship exceeds 20 feet, then at a height above the hull not less than such breadth, a bright white light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 20 points of the compass, so fixed as to throw the light 10 points on each side of the ship, viz. from right ahead to 2 points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 5 miles.

(b) On the starboard side, a green light, so constructed as to show

an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 2 miles.

(c) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 2 miles.

(d) The said green and red side lights shall be fitted with in-board screens projecting at least 3 feet forward from the light, so as to prevent these lights from being seen across the bow.

Art. 4. A steamship, when towing another ship, shall, in addition to her side lights, carry two bright white lights in a vertical line one over the other, not less than 3 feet apart, so as to distinguish her from other steamships. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light which other steamships are required to carry.

Art. 5.

(a) A ship, whether a steamship or a sailing ship, which from any accident is not under command, shall at night carry, in the same position as the white light which steamships are required to carry, and, if a steamship, in place of that light, three red lights in globular

lanterns, each not less than 10 inches in diameter, in a vertical line one over the other, not less than 3 feet apart, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 2 miles; and shall by day carry in a vertical line one over the other, not less than 3 feet apart, in front of but not lower than her foremast head, three black balls or shapes, each 2 feet in diameter.

- (b) A ship, whether a steamship or a sailing ship, employed in laying or in picking up a telegraph cable, shall at night carry in the same position as the white light which steamships are required to carry, and, if a steamship, in place of that light, three lights in globular lanterns, each not less than 10 inches in diameter, in a vertical line over one another, not less than 6 feet apart; the highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character that the red lights shall be visible at the same distance as the white light. By day she shall carry in a vertical line one over the other, not less than 6 feet apart, in front of but not lower than her foremast head, three shapes not less than 2 feet in diameter, of which the top and bottom shall be globular in shape and red in colour, and the middle one diamond in shape and white.

- (c) The ships referred to in this Article, when not making any way through the water, shall not carry the side lights, but when making way shall carry them.

- (d) The lights and shapes required to be shown by this Article are to be taken by other ships as signals that the ship showing them is not under command, and cannot therefore get out of the way. The signals to be made by ships in distress and requiring assistance are contained in Article 27.

Art. 6. A sailing ship under way, or being towed, shall carry the same lights as are provided by Article 3 for a steamship under way, with the exception of the white light, which she shall never carry.

Art. 7. Whenever, as in the case of small vessels during bad weather, the green and red side lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the star-board side.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light they respectively contain, and shall be provided with proper screens.

Art. 8. A ship, whether a steamship or a sailing ship, when at anchor, shall carry, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light, in a globular lantern of not less than 8 inches in diameter, and so constructed as to show a clear uniform and unbroken light visible all round the horizon at a distance of at least 1 mile.

Art. 9. A pilot vessel, when engaged on her station on pilotage duty, shall not carry the lights required for other vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

A pilot vessel, when not engaged on her station on pilotage duty, shall carry lights similar to those of other ships.

Art. 10. Open boats and fishing vessels of less than 20 tons net registered tonnage, when under way and when not having their nets, trawls, dredges, or lines in the water, shall not be obliged to carry the coloured side lights; but every such boat and

vessel shall in lieu thereof have ready at hand a lantern with a green glass on the one side and a red glass on the other side, and on approaching to or being approached by another vessel, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

The following portion of this Article applies only to fishing vessels and boats when in the sea off the coast of Europe lying north of Cape Finisterre:—

(a) All fishing vessels and fishing boats of 20 tons net registered tonnage, or upwards, when under way and when not required by the following regulations in this Article to carry and show the lights therein named, shall carry and show the same lights as other vessels under way.

(b) All vessels when engaged in fishing with drift nets shall exhibit two white lights from any part of the vessel where they can be best seen. Such lights shall be placed so that the vertical distance between them shall be not less than 6 feet and not more than 10 feet; and so that the horizontal distance between them measured in a line with the keel of the vessel shall be not less than 5 feet and not more than 10 feet. The lower of these two lights shall be the more forward, and both of them shall be of such a character, and contained in lanterns of such construction, as to show all round the horizon on a dark night, with a clear atmosphere, for a distance of not less than 3 miles.

(c) A vessel employed in line fishing with her lines out shall carry the same lights as a vessel when engaged in fishing with drift nets.

(d) If a vessel when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make

the fog signal for a vessel at anchor.

(e) Fishing vessels and open boats may at any time use a flare-up in addition to the lights which they are by this Article required to carry and show. All flare-up lights exhibited by a vessel when trawling, dredging, or fishing with any kind of drag net shall be shown at the after part of the vessel, excepting that, if the vessel is hanging by the stern to her trawl, dredge, or drag net, they shall be exhibited from the bow.

(f) Every fishing vessel and every open boat when at anchor between sunset and sunrise shall exhibit a white light visible all round the horizon at a distance of at least 1 mile.

(g) In fog, mist, or falling snow, a drift-net vessel attached to her nets, and a vessel when trawling, dredging, or fishing with any kind of drag net, and a vessel employed in line fishing with their lines out, shall, at intervals of not more than two minutes, make a blast with her fog-horn and ring her bell alternately.

Art. 11. A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light.

Sound Signals for Fog, etc.

Art. 12. A steamship shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstructions, and with an efficient fog-horn to be sounded by a bellows or other mechanical means, and also with an efficient bell (a). A sailing ship shall be provided with a similar fog-horn and bell.

In fog, mist, or falling snow, whether by day or night, the signals described in this Article shall be used as follows; that is to say,—

(a) A steamship under way shall

(a) In all cases where the Regulations require a bell to be used, a drum will be substituted on board Turkish vessels.

- make with her steam whistle, or other steam sound signal, at intervals of not more than two minutes, a prolonged blast.
- (b) A sailing ship under way shall make with her fog-horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when the wind is abaft the beam three blasts in succession.
- (c) A steamship and a sailing ship when not under way, shall at intervals of not more than two minutes ring the bell.

Speed of Ships to be moderate in Fog, etc.

Art. 13. Every ship, whether a sailing ship or steamship, shall, in a fog, mist, or falling snow, go at a moderate speed.

Steering and Sailing Rules.

Art. 14. When two sailing ships are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the others, as follows, viz. :—

- (a) A ship which is running free shall keep out of the way of a ship which is close-hauled.
- (b) A ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack.
- (c) When both are running free with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other.
- (d) When both are running free with the wind on the same side, the ship which is to windward shall keep out of the way of the ship which is to leeward.
- (e) A ship which has the wind aft shall keep out of the way of the other ship.

Art. 15. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are, when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which, by day, each ship sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each ship is in such a position as to see both the side lights of the other.

It does not apply, by day, to cases in which a ship sees another ahead crossing her own course; or by night, to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Art. 16. If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Art. 17. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

Art. 18. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary.

Art. 19. In taking any course authorized or required by these Regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz. :—

One short blast to mean, "I am directing my course to starboard."

Two short blasts to mean, "I am directing my course to port."

Three short blasts to mean, "I am going full speed astern."

The use of these signals is optional; but if they are used, the course of the ship must be in accordance with the signal made.

Art. 20. Notwithstanding anything contained in any preceding Article, every ship, whether a sailing ship or a steamship, overtaking any other shall keep out of the way of the overtaken ship.

Art. 21. In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

Art. 22. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course.

Art. 23. In obeying and construing these rules, due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

No Ship, under any circumstances, to neglect proper Precautions.

Art. 24. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Reservation of Rules for Harbours and Inland Navigation.

Art. 25. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland navigation.

Special Lights for Squadrons and Convoys.

Art. 26. Nothing in these rules shall interfere with the operation of any special rules made by the Government of any nation with respect

to additional station and signal lights for two or more ships of war, or for ships sailing under convoy.

Art. 27. When a ship is in distress and requires assistance from other ships or from the shore, the following shall be the signals to be used or displayed by her, either together or separately; that is to say,—

In the daytime—

1. A gun fired at intervals of about a minute;
2. The International Code signal of distress indicated by N C;
3. The distant signal, consisting of a square flag, having either above or below it a ball or anything resembling a ball.

At night—

1. A gun fired at intervals of about a minute;
2. Flames on the ship (as from a burning tar barrel, oil barrel, etc.);
3. Rockets or shells, throwing stars of any colour or description, fired one at a time, at short intervals.

ORDER IN COUNCIL, dated the 30th day of December 1884.

Whereas by an Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 11th day of August 1884, Her Majesty, on the joint recommendation of the Admiralty and the Board of Trade, was pleased to direct that on and after the 1st day of September 1884 the Regulations in the Schedule thereto should, so far as regarded British ships and boats, be substituted for the Regulations for preventing collisions at sea contained in the First Schedule to an Order in Council made as aforesaid, and dated the 14th day of August 1879.

And whereas by the Regulations contained in the Schedule to the same Order in Council of the 11th day of August 1884, it is provided as follows, viz. :—

Art. 3. A seagoing steamship when under weigh shall carry—

- (a) On or in front of the fore-

mast, at a height above the hull of not less than 20 feet, and if the breadth of the ship exceeds 20 feet, then at a height above the hull not less than such breadth, a bright white light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 20 points of the compass, so fixed as to throw the light 10 points on each side of the ship, viz. from right ahead to 2 points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 5 miles.

(b) On the starboard side, a green light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 2 miles.

(c) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to 2 points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 2 miles.

(d) The said green and red side lights shall be fitted with in-board screens projecting at least 3 feet forward from the light, so as to prevent these lights from being seen across the bow.

Art. 6. A sailing ship under way, or being towed, shall carry the same lights as are provided by Article 3 for a steamship under way, with the exception of the white light, which she shall never carry.

Art. 10.

(a) All fishing vessels and fishing boats of 20 tons net registered tonnage, or upwards,

when under way, and when not required by the following Regulations in this Article to carry and show the lights therein named, shall carry and show the same lights as other vessels under way.

And whereas the Admiralty and the Board of Trade have, in pursuance of the said recited Act, jointly recommended to Her Majesty that the Regulations contained in the Schedule to the said recited Order in Council of the 11th day of August 1884 shall, as regards British fishing vessels and boats when in the sea off the coast of Europe lying north of Cape Finisterre, be modified and added to in manner following; that is to say,—

That as regards steam vessels engaged in trawling, such vessels, if of 20 tons gross register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, should, if they do not carry the lights required by the said recited Article 3 of the Regulations aforesaid, be permitted to carry and show in lieu thereof and in substitution thereof, but not in addition thereto, whilst so engaged in trawling, and having their trawls in the water, and not being stationary as aforesaid, other lights of the description set forth in Part I. of the Schedule hereto; and that when under way, and not having their trawls in the water, they should carry and show the lights required by Article 3 above recited:

And that as regards sailing vessels engaged in trawling, such vessels, if of 20 tons net register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, should, if they do not carry the lights required by the said recited Article 6 of the Regulations aforesaid, be per-

mitted to carry and show in lieu thereof and in substitution therefor, but not in addition thereto, whilst so engaged in trawling, and having their trawls in the water, and not being stationary as aforesaid, other lights of the description set forth in Part II. of the Schedule hereto; and that when under way, and not having their trawls in the water, they should carry and show the lights required by Article 6 above recited.

Now, therefore, Her Majesty, by virtue of the powers vested in her by the said Act, and by and with the advice of her Privy Council, is pleased to direct that on and after the 1st day of January 1885 the Regulations contained in the Schedule to the said recited Order in Council of the 11th day of August 1884 shall, as regards British fishing vessels and boats when in the sea off the coast of Europe, lying north of Cape Finisterre, be modified and added to as follows, viz. :—

As regards steam vessels engaged in trawling when under steam, such vessels, if of 20 tons gross register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and show the lights required by the said recited Article 3 of the Regulations aforesaid, or shall carry and show in lieu thereof and in substitution therefor, but not in addition thereto, other lights of the description set forth in Part I. of the Schedule hereto :

As regards sailing vessels engaged in trawling, such vessels, if of 20 tons net register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and show the lights required by the said

recited Article 6 of the Regulations aforesaid, or shall carry and show in lieu thereof and in substitution therefor, but not in addition thereto, other lights of the description set forth in Part II. of the Schedule hereto :

The red and green lights, which are by this Order permitted as aforesaid to be carried in lieu of the lights required by Articles 3 and 6 of the said recited Regulations respectively, shall be of such a character as to be visible at a distance of not less than 2 miles on a dark night, with a clear atmosphere.

And Her Majesty is pleased further to direct that steam vessels of 20 tons gross register tonnage or upwards, and sailing vessels of 20 tons net register tonnage or upwards, engaged in trawling, when under way between sunset and sunrise, but not having their trawls in the water, shall, if steamships, carry and show the lights required by Article 3 above recited, and if sailing ships, shall carry and show the lights required by Article 6 above recited: Provided, however, that the modifications and additions set forth in Parts I., II. of the Schedule hereto shall not be applicable to the fishing vessels and boats of any foreign country, unless and until the same shall have been made applicable thereto by Order in Council.

SCHEDULE.

PART I.—STEAM VESSELS.

(1.) On or in front of the foremast head and in the same position as the white light which other steamships are required to carry, a lantern, showing a white light ahead, a green light on the starboard side, and a red light on the port side; such lantern shall be so constructed, fitted, and arranged as to show an uniform and unbroken white light over an arc of the horizon of 4 points of the compass, an uniform and unbroken green light over an arc of the horizon of

10 points of the compass, and an uniform and unbroken red light over an arc of the horizon of 10 points of the compass; and it shall be so fixed as to show the white light from right ahead to 2 points on the bow on each side of the ship, the green light from 2 points on the starboard bow to 4 points abaft the beam on the starboard side, and the red light from 2 points on the port bow to 4 points abaft the beam on the port side: and (2.) a white light in a globular lantern of not less than 8 inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon; the lantern containing such white light shall be carried lower than the lantern showing the green, white, and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than 6 feet nor more than 12 feet.

PART II.—SAILING VESSELS.

(1.) On or in front of the foremast head a lantern having a green glass on the starboard side and a red glass on the port side, so constructed, fitted, and arranged that the red and green do not converge, and so as to show an uniform and unbroken green light over an arc of the horizon of 12 points of the compass, and an uniform and unbroken red light over an arc of the horizon of 12 points of the compass; and it shall be so fixed as to show the green light from right ahead to 4 points abaft the beam on the starboard side, and the red light from right ahead to 4 points abaft the beam on the port side: and (2.) a white light in a globular lantern of not less than 8 inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon; the lantern containing such white light shall be carried lower than the lantern showing the green and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than 6 feet and not more than 12 feet.

ORDER IN COUNCIL, dated the 24th day of June 1885.

Whereas by an Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 30th day of December 1884, Her Majesty, on the joint recommendation of the Admiralty and the Board of Trade, was pleased to direct that on and after the 1st day of January 1885 the Regulations contained in the Schedule to an Order in Council made as aforesaid, and dated the 11th day of August 1884, should, as regards British fishing vessels and boats, when in the sea off the coast of Europe lying north of Cape Finisterre, be modified and added to, *inter alia*, as follows, viz:—

As regards sailing vessels engaged in trawling, such vessels, if of 20 tons net register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and show the lights required by Article 6 of the Regulations aforesaid, or shall carry and show in lieu thereof, and in substitution thereof, but not in addition thereto, other lights of the description set forth in Part II. of the Schedule to the said recited Order in Council of the 30th day of December 1884.

And whereas the Admiralty and the Board of Trade have, in pursuance of the said recited Act, jointly recommended to Her Majesty that the Regulations contained in the Schedule to the said recited Order in Council of the 11th day of August 1884 shall, as regards sailing vessels when engaged in trawling, be further modified and added to in manner following; that is to say,—

As regards sailing vessels engaged in trawling, such vessels having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruc-

tion, if they do not carry and show the lights required by Article 6 of the Regulations aforesaid, or the other lights of the description set forth in Part II. of the Schedule to the said recited Order in Council of the 30th of December 1884, shall carry and show in lieu of the lights required by Article 6 of the Regulations aforesaid, or the other lights of the description set forth in paragraph 2 of the Schedule to the said recited Order, other lights as follows; that is to say,—

A white light in a globular lantern of not less than 8 inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon, and visible on a dark night, with a clear atmosphere, for a distance of at least 2 miles; and also a sufficient supply of red pyrotechnic lights which shall each burn for at least 30 seconds, and shall, when so burning, be visible for the same distance under the same conditions as the white light. The white light shall be

shown from sunset to sunrise, and one of the red pyrotechnic lights shall be shown on approaching, or on being approached by, another ship or vessel in sufficient time to prevent collision.

Now, therefore, Her Majesty, by virtue of the powers vested in her by the said Act, and by and with the advice of her Privy Council, is pleased to direct that on and after the 24th day of June 1885 the Regulations contained in the Schedule to the Order in Council of the 11th day of August 1884 shall, as regards British sailing fishing vessels and boats, when in the sea off the coast of Europe lying north of Cape Finisterre, be further modified and added to accordingly; that is to say, such sailing vessels shall, whatever be their tonnage, be at liberty to carry the substituted lights hereinbefore described in lieu of, and in substitution for, but not in addition to, the lights prescribed to be carried by such sailing vessels by the Orders in Council dated respectively the 11th day of August 1884 and the 30th day of December 1884.

ACTS OF PARLIAMENT.

COAL MINES REGULATION ACT, 1887.

CHAPTER 58.

An Act to consolidate with amendments the Coal Mines Acts, 1872 and 1886, and the Stratified Ironstone Mines (Gunpowder) Act, 1881.—[16th September 1887.]

WHEREAS it is expedient to repeal and re-enact with amendments the Coal Mines Acts, 1872 and 1886, and the Stratified Ironstone Mines (Gunpowder) Act, 1881:

[35 & 36 Vict. c. 76; 49 & 50 Vict. c. 40; 44 & 45 Vict. c. 26.]

Be it therefore enacted by the Queen's most Excellent Majesty, by

and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PRELIMINARY.

Short Title.

1. This Act may be cited as the Coal Mines Regulation Act, 1887.

Commencement of Act.

2. This Act shall not come into operation until the 1st January 1888, which date is in this Act referred to as the commencement of this Act.

Application of Act.

3. This Act shall apply to mines of coal, mines of stratified ironstone, mines of shale, and mines of fire-clay; and in this Act, unless the context otherwise requires, the word "mine" means a mine to which this Act applies.

PART I.—EMPLOYMENT OF BOYS,
GIRLS, AND WOMEN.

*Employment below Ground of Boys
under Twelve and of Girls and
Women prohibited.*

4. No boy under the age of twelve years, and no girl or woman of any age, shall be employed in or allowed to be for the purpose of employment in any mine below ground.

*Hours of Employment of Boys over
Twelve below Ground.*

5. A boy of or above the age of twelve years shall not be employed in or allowed to be for the purpose of employment in any mine below ground for more than fifty-four hours in any one week, nor more than ten hours in any one day, nor otherwise than in accordance with the regulations hereinafter contained with respect to the employment of boys in a mine below ground.

*Regulations as to Employment of Boys
below Ground.*

6. With respect to the employment of boys in a mine below ground, the following regulations shall have effect; that is to say,—

- (1.) There shall be allowed an interval of not less than eight hours between the period of employment on Friday and the period of employment on the following Saturday, and in other cases of not less than twelve hours between each period of employment.
- (2.) The period of each employment shall be deemed to begin at the time of leaving the surface, and to end at the time of returning to the surface.
- (3.) A week shall be deemed to begin at midnight on Saturday night and to end at midnight on the succeeding Saturday night.

*Employment of Boys, Girls, and
Women above Ground.*

7. With respect to boys, girls, and women employed above ground, in connection with any mine, the following provisions shall have effect:—

- (1.) No boy or girl under the age of twelve years shall be so employed.
- (2.) No boy or girl under the age of thirteen years shall be so employed—
 - (a) for more than six days in any one week; or
 - (b) if employed for more than three days in any one week, for more than six hours in any one day; or
 - (c) in any other case for more than ten hours in any one day.
- (3.) No boy or girl of or above the age of thirteen years and no woman shall be so employed for more than fifty-four hours in any one week or more than ten hours in any one day.
- (4.) No boy, girl, or woman shall be so employed between the hours of nine at night and five on the following morning, nor on Sunday, nor after two o'clock on Saturday afternoon.
- (5.) There shall be allowed an interval of not less than eight hours between the termination of employment on Friday and the commencement of employment on the following Saturday, and in other cases of not less than twelve hours between the termination of employment on one day and the commencement of the next employment.
- (6.) A week shall be deemed to begin at midnight on Saturday night and to end at midnight on the succeeding Saturday night.
- (7.) No boy, girl, or woman shall be employed continuously for more than five hours without an interval of at least half an hour for a meal, nor for more than eight hours on any one day, without an interval or intervals for meals amounting altogether to not less than one hour and a half.

(8.) No boy, girl, or woman shall be employed in moving railway waggons.

The provisions of this section as to the employment of boys, girls, and women after two o'clock on Saturday afternoon, shall not apply in the case of any mine in Ireland, so long as it is exempted by order of a Secretary of State.

Register to be kept of Boys, Girls, and Women employed.

8. (1.) The owner, agent, or manager of every mine shall keep in the office at the mine a register, and shall cause to be entered in that register, in such form as the Secretary of State may from time to time prescribe or sanction, the name, age, residence, and date of first employment of all boys employed in the mine below ground, and of all boys, girls, and women employed above ground in connection with the mine; and shall on request produce the register to any inspector under this Act, and to any officer of a school board or school attendance committee in the district in which the mine is situate, at the mine at all reasonable times, and shall allow any such inspector or officer to inspect and copy the same.

(2.) The immediate employer of every boy, other than the owner, agent, or manager of the mine, before he causes the boy to be below ground in any mine, shall report to the manager of the mine, or to some person appointed by that manager, that he is about to employ the boy in the mine.

Penalty for Employment of Persons in Contravention of Act.

9. If any person contravenes or fails to comply with, or permits any person to contravene or fail to comply with, any provision of this Act with respect to the employment of boys, girls, or women, or to the register of boys, girls, and women, or to reporting the intended employment of boys, he shall be guilty of an offence against this Act; and in the event of any such contravention or non-compliance by any person whomsoever, the owner, agent, and

manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the provisions of this Act, to prevent the contravention or non-compliance.

Payment of School Fees out of Wages.

10. (1.) After a request in writing by the principal teacher of a public elementary school which is attended by any boy or girl employed in or in connection with a mine, the person who pays the wages of the boy or girl shall, as long as he employs the boy or girl, pay to the principal teacher of that school, for every week that the boy or girl attends the school, the weekly sum specified in the application, not exceeding twopence per week, and not exceeding one-twelfth part of the wages of the boy or girl, and may deduct the sum so paid by him from the wages payable for the services of the boy or girl.

(2.) If any person after such application refuses to pay on demand any sum that becomes due as aforesaid, he shall be liable to a penalty not exceeding ten shillings.

WAGES.

Prohibition of Payment of Wages at Public Houses, etc.

11. (1.) No wages shall be paid to any person employed in or about any mine at or within any public house, beer shop, or place for the sale of any spirits, beer, wine, cider, or other spirituous or fermented liquor, or other house of entertainment, or any office, garden, or place belonging or contiguous thereto, or occupied therewith.

(2.) Every person who contravenes or fails to comply with, or permits any person to contravene or fail to comply with, this section shall be guilty of an offence against this Act; and in the event of any such contravention or non-compliance by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against

this Act, unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing the provisions of this section to prevent the contravention or non-compliance.

Payment of Persons employed in Mines by Weight.

12. (1.) Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable.

Provided that nothing in this section shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer, or by the person immediately employed by him; such deductions being determined in such special mode as may be agreed upon between the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or by some person appointed in that behalf by the owner, agent, or manager, or (if any check weigher is stationed for this purpose as hereinafter mentioned), by such person and such check weigher, or in case of difference, by a third person, to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other, or in default of agreement, appointed by a chairman of a court of quarter sessions within the jurisdiction of which any shaft of the mine is situate.

(2.) If any person contravenes or fails to comply with, or permits any

person to contravene or fail to comply with, this section, he shall be guilty of an offence against this Act; and in the event of any such contravention or non-compliance by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing the provisions of this section to prevent the contravention or non-compliance.

(3.) Where it is proved to the satisfaction of a Secretary of State, in the case of any mine or class of mines employing not more than thirty persons underground, to be expedient that the persons employed therein should, upon the joint representation of the owner or owners of any such mine or class of mines and the said persons, be paid by any method other than that provided by this Act, such Secretary of State may, if he think fit, by order allow the same either without conditions or during the time and on the conditions specified in the order.

Appointment on part of Men, and removal, of Check Weigher.

13. (1.) The persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as "a check weigher") at each place appointed for the weighing of the mineral, and at each place appointed for determining the deductions in order that he may on behalf of the persons by whom he is so stationed take a correct account of the weight of the mineral, or determine correctly the deductions as the case may be.

(2.) A check weigher shall have every facility afforded to him for enabling him to fulfil the duties for which he is stationed, including facilities for examining and testing the weighing machine, and checking the taring of tubs and trams where necessary; and if at any mine proper facilities are not afforded to a check weigher as required by this section, the owner, agent, and manager of

the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means to enforce to the best of his power the requirements of this section.

(3.) A check weigher shall not be authorized in any way to impede or interrupt the working of the mine, or to interfere with the weighing, or with any of the workmen, or with the management of the mine; but shall be authorized only to take such account or determine such deductions as aforesaid, and the absence of a check weigher from the place at which he is stationed shall not be a reason for interrupting or delaying the weighing or the determination of deductions at such place respectively, but the same shall be done or made by the person appointed in that behalf by the owner, agent, or manager, unless the absent check weigher had reasonable ground to suppose that the weighing or the determination of the deductions, as the case may be, would not be proceeded with: Provided always, that nothing in this section shall prevent a check weigher giving to any workman an account of the mineral gotten by him, or information with respect to the weighing, or the weighing machine, or the taring of the tubs or trams, or with respect to the deductions or any other matter within the scope of his duties as check weigher, so always, nevertheless, that the working of the mine be not interrupted or impeded.

(4.) If the owner, agent, or manager of the mine desires the removal of a check weigher on the ground that the check weigher has impeded or interrupted the working of the mine, or interfered with the weighing, or with any of the workmen, or with the management of the mine, or has at the mine, to the detriment of the owner, agent, or manager, done anything beyond taking such account determining such deductions or giving such information as aforesaid, he may complain to a court of summary jurisdiction, who, if of opinion that the owner, agent, or manager shows sufficient *prima facie* ground for the removal of the check weigher,

shall call on the check weigher to show cause against his removal.

(5.) On the hearing of the case the Court shall hear the parties, and, if they think that at the hearing sufficient ground is shown by the owner, agent, or manager to justify the removal of the check weigher, shall make a summary order for his removal, and the check weigher shall thereupon be removed, but without prejudice to the stationing of another check weigher in his place.

(6.) The Court may in every case make such order as to the costs of the proceedings as the Court may think just.

(7.) If in pursuance of any order of exemption made by a Secretary of State, the persons employed in a mine are paid by the measure or gauge of the material gotten by them, the provisions of this Act shall apply in like manner as if the term "weighing" included measuring and gauging, and the terms relating to weighing shall be construed accordingly.

(8.) If the person appointed by the owner, agent, or manager to weigh the mineral impedes or interrupts the check weigher in the proper discharge of his duties, or improperly interferes with or alters the weighing machine or the tare in order to prevent a correct account being taken of the weighing and taring, he shall be guilty of an offence against this Act.

Remuneration of Check Weigher.

14. (1.) Where a check weigher has been appointed by the majority, ascertained by ballot, of the persons employed in a mine who are paid according to the weight of the mineral gotten by them, and has acted as such, he may recover from any person for the time being employed at such mine and so paid, his proportion of the check weigher's wages or recompense, notwithstanding that any of the persons by whom the check weigher was appointed may have left the mine or others have entered the same since the check weigher's appointment, any rule of law or equity to the contrary notwithstanding.

(2.) It shall be lawful for the owner or manager of any mine, where the majority of the before-mentioned persons, ascertained as aforesaid, so agree, to retain the agreed contribution of the persons so employed and paid as aforesaid for the check weigher, notwithstanding the provisions of the Acts relating to truck, and to pay and account for the same to the check weigher.

*Application of 41 & 42 Vict. c. 49
to Weights, etc., used in Mines.*

15. (1.) The Weights and Measures Act, 1878, shall apply to all weights, balances, scales, steelyards, and weighing machines used at any mine for determining the wages payable to any person employed in the mine according to the weight of the mineral gotten by him, in like manner as it applies to weights, balances, scales, steelyards, and weighing machines used for trade.

(2.) An inspector of weights and measures, appointed under the said Act, 1878, shall once at least in every six months inspect and examine in manner directed by the said Act the weights, balances, scales, steelyards, and weighing machines used or in the possession of any person for use as aforesaid at any mine within his district; and shall also make such inspection and examination at any other time in any case where he has reasonable cause to believe that there is in use at the mine any false or unjust weight, balance, scale, steelyard, or weighing machine.

(3.) The inspector shall also inspect and examine the measures and gauges in use at the mines within his district; but nothing in this section shall prevent or interfere with the use of the measures or gauges ordinarily used at the mine.

(4.) An inspector may, for the purposes of this section, without any authorization from a justice of the peace, exercise at or in any mine, as respects all weights, measures, scales, balances, steelyards, and weighing machines used or in the possession of any person for use at or in that mine, all such powers as he could exercise, if authorized in writing by a justice of the peace, under section

forty-eight of the Weights and Measures Act, 1878, with respect to any such weights, measures, scales, balances, steelyards, and weighing machines as therein mentioned; and all the provisions of that section, including the liability to penalties, shall apply to such inspection.

(5.) The inspector of weights and measures shall not, in fulfilling the duties required of him under this section, impede or obstruct the working of the mine.

SINGLE SHAFTS.

Prohibition of Single Shafts.

16. (1.) After the commencement of this Act the owner, agent, or manager of a mine shall not employ any person in the mine, or permit any person to be in the mine for the purpose of employment therein, unless the following conditions respecting shafts or outlets are complied with, that is to say,—

(a) There must be at least two shafts or outlets, with which every seam for the time being at work in the mine shall have a communication, so that such shafts or outlets shall afford separate means of ingress and egress available to the persons employed in every such seam, whether the shafts or outlets belong to the same mine or to more than one mine.

(b) Such shafts or outlets must not at any point be nearer to one another than fifteen yards; and there shall be between such two shafts or outlets a communication not less than four feet wide and three feet high, and in the case of communications made after the commencement of this Act between shafts or outlets, not less than four feet high.

(c) Proper apparatus for raising and lowering persons at each such shaft or outlet shall be kept on the works belonging to the mine; and such apparatus, if not in actual use at the shafts or outlets, shall be constantly available for use.

(2.) Every owner, agent, and

manager of a mine who acts in contravention of or fails to comply with this section shall be guilty of an offence against this Act.

(3.) Any of Her Majesty's superior courts, whether any other proceedings have or have not been taken, may, on the application of the Attorney-General, prohibit by injunction the working of any mine in which any person is employed, or is permitted to be for the purpose of employment, in contravention of this section, and may award such costs in the matter of the injunction as the Court thinks just; but this provision shall be without prejudice to any other remedy permitted by law for enforcing the provisions of this Act.

(4.) Written notice of the intention to apply for such injunction in respect of any mine shall be given to the owner, agent, or manager of the mine not less than ten days before the application is made.

Agreements not to preclude Compliance with Act.

17. No person shall be precluded by any agreement from doing such acts as may be necessary for providing a second shaft or outlet to a mine, where the same is required by this Act, or be liable under any contract to any penalty or forfeiture for doing such acts as may be necessary in order to comply with the provisions of this Act with respect to shafts or outlets.

Exceptions from Provisions as to Shafts.

18. The foregoing provisions of this Act with respect to shafts or outlets shall not apply—

(i.) In the case of a new mine being opened—

(a) to any working for the purpose of making a communication between two or more shafts; or

(b) to any working for the purpose of searching for or proving minerals;

so long as not more than twenty persons are employed below ground at any one time in the whole of the different seams in connection with the single shaft or outlet: nor

(ii.) To any proved mine so long as it is exempted by order of a Secretary of State on the ground either—

(a) that the quantity of mineral proved is not sufficient to repay the outlay which would be occasioned by sinking or making a second shaft or outlet, or by establishing communication with a second shaft or outlet, in any case where such communication existed and has become unavailable; or

(b) that the workings in any seam of the mine have reached the boundary of the property or the extremity of the mineral field of which that seam is a part, and that it is expedient to work away the pillars already formed in course of the ordinary working, notwithstanding that one of the shafts or outlets may be cut off by so working away the pillars of that seam;

and so long as not more than twenty persons are employed below ground at any one time in the whole of the different seams in connection with a single shaft or outlet; nor

(iii.) To any mine—

(a) while a shaft is being sunk, or an outlet being made; or

(b) one of the shafts or outlets of which has become, by reason of some accident, unavailable for the use of the persons employed in the mine;

so long as the mine is exempted by order of a Secretary of State, and as the conditions (if any) annexed to the order of exemption are duly observed. The provision in this Act requiring the two shafts or outlets of a mine to be separated by a distance of not less than fifteen yards, shall not apply to any mine which is provided with two shafts sunk before the 1st day of January 1865, but at that time separated by a distance of less than ten feet, or commenced to be sunk before the commencement of this Act, but separated by a

distance of more than ten feet and less than fifteen yards.

The foregoing provisions of this Act as to the dimensions of the communications between two shafts or outlets shall not apply to any mine or class of mines so long as the same is exempted therefrom by order of a Secretary of State by reason of the thinness of the seams or other exigencies affecting that mine or class of mines, and so long as the conditions (if any) annexed to the order of exemption are duly observed.

DIVISION OF MINE INTO PARTS.

19. (1.) Where two or more parts of a mine are worked separately, the owner, agent, or manager of the mine may give notice in writing to that effect to the inspector of the district, and thereupon each such part shall, for all the purposes of this Act, be deemed to be a separate mine.

(2.) If a Secretary of State is of opinion that the division of a mine in pursuance of this section tends to lead to evasion of the provisions of this Act, or otherwise to prevent the carrying of this Act into effect, he may object to the division by notice served on the owner, agent, or manager of the mine; and the owner, agent, or manager, if he declines to acquiesce in such objection, may, within twenty days after receipt of the notice, send a notice to the inspector of the district stating that he declines so to acquiesce, and thereupon the matter shall be determined by arbitration in manner provided by this Act; and the date of the receipt of the last-mentioned notice shall be deemed to be the date of the reference.

CERTIFICATED MANAGERS.

Appointment of Manager of Mine.

20. (1.) Every mine shall be under a manager, who shall be responsible for the control, management, and direction of the mine; and the owner or agent of every such mine shall nominate himself or

some other person to be the manager of such mine, and shall send written notice to the inspector of the district of the manager's name and address.

(2.) A person shall not be qualified to be a manager of a mine unless he is for the time being registered as the holder of a first-class certificate under this Act.

(3.) If any mine is worked for more than fourteen days without there being such a manager for the mine as is required by this section, the owner and agent of the mine shall each be liable to a fine not exceeding fifty pounds, and to a further fine not exceeding ten pounds for every day during which the mine is so worked.

Provided that—

(a) The owner of the mine shall not be liable to any such fine if he proves that he had taken all reasonable means by the enforcement of this section to prevent the mine being worked in contravention of this section;

(b) If for any reasonable cause there is for the time being no manager of a mine qualified as required by this section, the owner or agent of the mine may appoint any competent person not holding a certificate under this Act to be manager, for a period not exceeding two months or such longer period as may elapse before such person has an opportunity in the district wherein the mine is situate of obtaining by examination a certificate under this Act, and shall send to the inspector of the district a written notice of the manager's name and address, and of the reason for his appointment; and

(c) A mine in which not more than thirty persons are employed below ground shall be exempt from the provisions of this section, unless the inspector of the district, by notice in writing served on the owner or agent of the mine, requires that it be under the control of a manager.

Daily Supervision of Mine by Manager or Under-Manager.

21. (1.) In every mine required by this Act to be under the control of a certificated manager, daily personal supervision shall be exercised either by the manager or by an under-manager nominated in writing by the owner or agent of the mine.

(2.) Every person so nominated must hold either a first-class or second-class certificate under this Act, and shall, in the absence of the manager, have the same responsibility, and be subject to the same liabilities as the manager under this Act; but the nomination of an under-manager shall not affect the personal responsibility of the manager under this Act.

Disqualifications for Post of Manager or Under-Manager.

22. A contractor for mineral, or person employed by such a contractor, is not eligible for the post of manager or under-manager under this Act.

Constitution of Board for appointing Examiners for granting Certificates of Competency to Managers and Under-Managers.

23. (1.) There shall be two descriptions of certificates of competency under this Act, (i.) first-class certificates, that is to say, certificates of fitness to be manager; and (ii.) second-class certificates, that is to say, certificates of fitness to be under-manager; but no person shall be entitled to a certificate under this Act unless he shall have had practical experience in a mine for at least five years.

(2.) For the purpose of granting in any part of the United Kingdom, to be from time to time defined by an order of a Secretary of State, certificates of competency for the purposes of this Act, examiners shall be appointed by a Board consisting of—

- (a) Three persons being owners of mines in the said part of the United Kingdom; and
- (b) Three persons employed or

who have been employed in or about any mine in the said part of the United Kingdom, not being owners, agents, or managers of a mine; and

- (c) Three persons practising as mining engineers, agents, or managers of mines, or coal viewiers in the said part of the United Kingdom; and

- (d) One inspector under this Act.

(3.) The members of the Board shall be appointed and may be removed by a Secretary of State, and shall hold office during his pleasure.

Proceedings and Powers of Board for appointing Examiners.

24. (1.) The proceedings of each Board shall be in accordance with the rules contained in Schedule I. to this Act.

(2.) Each Board shall from time to time appoint examiners, not being members of the Board, except with the consent of the Secretary of State, to conduct the examinations in the part of the United Kingdom for which the Board acts, of applicants for certificates of competency under this Act, and may from time to time make, alter, and revoke rules as to the conduct of such examinations and the qualifications of the applicants, so, however, that in every such examination regard shall be had to such knowledge as is necessary for the practical working of mines in that part of the United Kingdom, and that the examination and qualifications of applicants for second-class certificates shall be suitable for practical working miners.

(3.) Each Board shall make from time to time to a Secretary of State a report of their proceedings, and of such other matters as a Secretary of State may from time to time require.

Rules by Secretary of State as to Examinations.

25. A Secretary of State may from time to time make, alter, and revoke rules as to the places and times of examinations of applicants for certificates of competency under

this Act, the number and remuneration of the examiners, and the fees to be paid by the applicants, so that the fees do not exceed those specified in Schedule II. to this Act. Every such rule shall be observed by every Board appointed under this Act to which it applies.

Grant of Certificates to Applicants on passing Examination.

26. (1.) A Secretary of State shall deliver to every applicant who is duly reported by the examiners to have passed the examination satisfactorily, and to have given satisfactory evidence of his sobriety, experience, ability, and general good conduct, such a certificate of competency as the case requires. The certificate shall be in such form as a Secretary of State from time to time directs.

(2.) A register of the holders of such certificates shall be kept by such person and in such manner as a Secretary of State from time to time directs.

Inquiry into Competency of Manager, and Cancellation of Certificate in Case of Unfitness.

27. If at any time representation is made to a Secretary of State by an inspector or otherwise, that any manager or under-manager holding a certificate under this Act is by reason of incompetency or gross negligence unfit to discharge his duties, or has been convicted of an offence against this Act, the Secretary of State may, if he think fit, cause inquiry to be made into the conduct of the manager or under-manager, and with respect to every such inquiry the following provisions shall have effect :—

(1.) The inquiry shall be public, and shall be held at such place as the Secretary of State may appoint by such county court judge, metropolitan police magistrate, stipendiary magistrate, or other person or persons as may be directed by the Secretary of State, and either alone or with the assistance of any assessor or assessors named by the Secretary of State:

- (2.) The Secretary of State shall, before the commencement of the inquiry, furnish to the manager or under-manager a statement of the case on which the inquiry is instituted.
- (3.) Some person appointed by the Secretary of State shall undertake the management of the case.
- (4.) The manager or under-manager may attend the inquiry by himself, his counsel, solicitor, or agent, and may, if he thinks fit, be sworn and examined as an ordinary witness in the case.
- (5.) The person or persons appointed to hold the inquiry, in this Act referred to as the court, shall, on the conclusion of the inquiry, send to the Secretary of State a report containing a full statement of the case, and the opinion of the court thereon, and such report of, or extracts from the evidence, as the court may think fit.
- (6.) The court shall have power to cancel or suspend the certificate of the manager or under-manager, if it finds that he is by reason of incompetency or gross negligence, or of his having been convicted of an offence against this Act, unfit to discharge his duty.
- (7.) The court may, if it thinks fit, require a manager or under-manager to deliver up his certificate, and if any manager or under-manager fails, without sufficient cause to the satisfaction of the court, to comply with such requisition, he shall be liable to a fine not exceeding one hundred pounds. The court shall hold a certificate so delivered until the conclusion of the investigation, and shall then either restore, cancel, or suspend the certificate according to its judgment on the case.
- (8.) The court shall have for the purpose of the inquiry, all the powers of a court of summary jurisdiction, and all the powers of an inspector under this Act.

(9.) The court may also, by summons signed by the court, require the attendance of all such persons as it thinks fit to summon and examine for the purpose of the inquiry; and every person so summoned shall be allowed such expenses as would be allowed to a witness attending on subpoena before a court of record; and in case of dispute as to the amount to be allowed, the same shall be referred by the court to a master of one of Her Majesty's superior courts, who, on request signed by the court, shall ascertain and certify the proper amount of such expenses.

Costs and Expenses of Inquiry.

28. (1.) The court may make such order as it thinks fit respecting the costs and expenses of the inquiry, and such order shall, on the application of any party entitled to the benefit thereof, be enforced by any court of summary jurisdiction as if such costs and expenses were a fine imposed by that court.

(2.) The Secretary of State may, if he thinks fit, pay to the person or persons constituting the court, including any assessors, such remuneration as he may with the consent of the Treasury appoint.

(3.) Any costs and expenses ordered by the court to be paid by a Secretary of State, and any remuneration paid under this section, shall be paid out of moneys provided by Parliament.

*Record of Cancellation of Certificate.
Restoration in certain Cases.*

29. (1.) Where a certificate of a manager or under-manager is cancelled or suspended in pursuance of this Act, a Secretary of State shall cause the cancellation or suspension to be recorded in the register of holders of certificates.

(2.) A Secretary of State may at any time, if it is shown to him to be just so to do, renew or restore, on such terms as he thinks fit, any certificate which has been cancelled or suspended in pursuance of this Act, and cause the renewal or

restoration to be recorded in the register aforesaid.

Copy of Certificate in Case of Loss.

30. Whenever any person proves to the satisfaction of a Secretary of State that he has, without fault on his part, lost or been deprived of any certificate granted to him under this Act, the Secretary of State shall, on payment of such fee, if any, as he may direct, but not exceeding the fee specified in Schedule II. to this Act, cause a copy of the certificate to which the applicant appears by the register to be entitled, to be made out and certified by the person who keeps the register, and delivered to the applicant; and any copy which purports to be so made and certified as aforesaid shall have all the effect of the original certificate.

*Expenses in relation to Certificates,
and Application of Fees.*

31. (1.) All expenses incurred by a Secretary of State with the concurrence of the Treasury in carrying into effect the provisions of this Act with respect to certificates of competency shall be defrayed out of moneys provided by Parliament.

(2.) All fees payable by the applicants for examination for or for a copy of a certificate under this Act shall be paid into the receipt of Her Majesty's Exchequer in such manner as the Treasury may from time to time direct, and be carried to the Consolidated Fund.

*Penalty for Forgery of, or False
Declarations as to, Certificate.*

32. Every person who commits any of the following offences; that is to say,—

(1.) Forges, or counterfeits, or knowingly makes any false statement in any certificate of competency under this Act, or in any certificate of service granted under this Act or any Act repealed by this Act, or any official copy of any such certificate; or

(2.) Knowingly utters or uses any such certificate or copy which has been forged or

counterfeited or contains any false statement; or

- (3.) For the purpose of obtaining, for himself or any other person, employment as a certificated manager or under-manager, or the grant, renewal, or restoration of any certificate under this Act, or a copy thereof, either

(a) makes or gives any declaration, representation, statement, or evidence which is false in any particular, or

(b) knowingly utters, produces, or makes use of any such declaration, representation, statement, or evidence, or any document containing the same,

shall be guilty of a misdemeanour, and be liable on conviction to imprisonment for a term not exceeding two years, with or without hard labour.

RETURNS, PLAN, NOTICES, AND ABANDONMENT.

Returns by Owner, Agent, or Manager of Mine.

33. (1.) On or before the 21st day of January in every year the owner, agent, or manager of every mine shall send to the inspector of the district on behalf of a Secretary of State a correct return, specifying, with respect to the year ending on the preceding 31st day of December, the particulars contained in the form in Schedule III. to this Act, or in such other form as may from time to time be prescribed in lieu of that form by a Secretary of State: Provided that in the case of any mine which is not required by this Act to be under the control of a certificated manager, a return shall not be required of the particulars contained in Part B. of the said form unless or until a Secretary of State otherwise prescribes.

(2.) Forms for the purpose of the returns required by this section shall from time to time, on application, be furnished by the inspector of the district on behalf of the Secretary of State.

(3.) The Secretary of State may publish the aggregate results of the returns made under this section with respect to any particular county or inspector's district, or any large portion of a county or inspector's district, and so much of any individual return as does not relate to the quantity of mineral gotten or wrought, but the portion of any individual return relating to the quantity of mineral gotten or wrought shall not be published without the consent of the person making the return, or of the owner of the mine to which it relates; and no person except an inspector or Secretary of State, or any body of commissioners incorporated by Act of Parliament for the drainage of mines, and authorized to assess and levy rates in respect of minerals gotten from such mines, shall be entitled, without such consent, to see such portion as aforesaid of any individual return.

(4.) Every owner, agent, or manager of a mine who fails to comply with this section, or makes any return which is to his knowledge false in any particular, shall be guilty of an offence against this Act.

Plan of Mine to be kept at Office.

34. (1.) The owner, agent, or manager of every mine shall keep in the office at the mine an accurate plan of the workings of the mine, showing the workings up to a date not more than three months previously, and the general direction and rate of dip of the strata, together with a section of the strata sunk through, or if that be not reasonably practicable, a statement of the depth of the shaft, with a section of the seam.

(2.) The owner, agent, or manager of the mine shall, on request at any time of an inspector under this Act, produce to him at the office at the mine such plan and section, and shall also on the like request mark on such plan and section the then state of the workings of the mine; and the inspector shall be entitled to examine the plan and section, and for official

purposes only to make a copy of any part thereof respectively.

(3.) If the owner, agent, or manager of any mine fails to keep, or wilfully refuses to produce or allow to be examined, the plan and section aforesaid, or wilfully withholds any portion thereof, or wilfully refuses, on request, to mark thereon the state of the workings of the mine, or conceals any part of those workings, or produces an imperfect or inaccurate plan or section, he shall (unless he shows that he was ignorant of the concealment, imperfection, or inaccuracy) be guilty of an offence against this Act; and, further, the inspector may by notice in writing (whether a penalty for the offence has or has not been inflicted) require the owner, agent, or manager to cause an accurate plan and section, showing the particulars hereinbefore required, to be made within a reasonable time at the expense of the owner of the mine. Every such plan must be on a scale of not less than that of the Ordnance Survey of 25 inches to the mile, or on the same scale as the plan for the time being in use at the mine.

(4.) If the owner, agent, or manager fails within twenty days after the requisition of the inspector, or within such further time as may be allowed by a Secretary of State, to cause such plan and section to be made as hereby required, he shall be guilty of an offence against this Act.

Notice to be given of Accidents in Mines.

35. (1.) Where in or about any mine, whether above or below ground, either—

- (i.) loss of life or any personal injury whatever to any person employed in or about the mine occurs by reason of any explosion of gas or of any explosive, or of any steam boiler; or
- (ii.) loss of life or any serious personal injury to any person employed in or about the mine occurs by reason of any accident whatever,

the owner, agent, or manager of the mine shall, within twenty-four hours next after the explosion or accident, send notice in writing of the explosion or accident and of the loss of life or personal injury occasioned thereby to the inspector of the district on behalf of a Secretary of State, and shall specify in the notice the character of the explosion or accident, and the number of persons killed or injured respectively.

(2.) Where loss of life or serious personal injury has immediately resulted from explosion or accident, the place where the explosion or accident occurred shall be left as it was immediately after the explosion or accident until the expiration of at least three days after the sending of such notice as aforesaid of such explosion or accident, or until the visit of the place by an inspector, whichever first happens, unless compliance with this enactment would tend to increase or continue a danger, or would impede the working of the mine.

(3.) Where any personal injury, of which notice is required to be sent under this section, results in the death of the person injured, notice in writing of the death shall be sent to the inspector of the district on behalf of a Secretary of State within twenty-four hours after such death comes to the knowledge of the owner, agent, or manager.

(4.) Every owner, agent, or manager who fails to act in compliance with this section shall be guilty of an offence against this Act.

Notice to be given of Opening and Abandonment of Mine.

36. In any of the following cases, namely,—

- (i.) Where any working is commenced for the purpose of opening a new shaft for, or a seam of, any mine;
- (ii.) Where a shaft or seam of any mine is abandoned, or the working thereof discontinued;
- (iii.) Where the working of a shaft or a seam of any mine is recommenced after any abandonment or discontinuance for a period exceeding two months; or

(iv.) Where any change occurs in the name of any mine, or in the name of the owner, agent, or manager of any mine, to which this Act applies, or in the principal officers of any incorporated company which is the owner of a mine:

the owner, agent, or manager of the mine shall give notice thereof to the inspector of the district within two months after the commencement, abandonment, discontinuance, re-commencement or change; and if such notice is not given, the owner, agent, or manager shall be guilty of an offence against this Act.

Fencing in Case of abandoned Mine.

37. (1.) Where any mine is abandoned, or the working thereof discontinued, at whatever time the abandonment or discontinuance occurred, the owner thereof, and every other person interested in the minerals of the mine, shall cause the top of every shaft and every side entrance from the surface to be, and to be kept, securely fenced for the prevention of accidents:

Provided that—

(i.) Subject to any contract to the contrary, the owner of the mine shall, as between himself and any other person interested in the minerals of the mine, be liable to carry into effect this section, and to pay any costs, charges, and expenses incurred by any other person interested in the minerals of the mine in carrying this section into effect.

(ii.) Nothing in this section shall exempt any person from any liability under any other Act, or otherwise.

(2.) If any person fails to act in conformity with this section, he shall be guilty of an offence against this Act.

(3.) No person shall be precluded by any agreement from doing, or be liable under any contract to any damages, penalty, or forfeiture for doing, such acts as may be necessary in order to comply with the provisions of this section.

(4.) If any occupier of land, or other person, wilfully obstructs the

owner of a mine or other person interested as aforesaid in doing any such acts, he shall be guilty of an offence against this Act.

(5.) Any shaft or side entrance which is not fenced as required by this section, and is within 50 yards of any highway, road, footpath, or place of public resort, or is in open or uninclosed land, shall be deemed to be a nuisance within the meaning of section 91 of the Public Health Act, 1875.

Plan of abandoned Mine or Seam to be sent to Secretary of State.

38. (1.) Where any mine or seam is abandoned, the owner of the mine or seam at the time of its abandonment shall, within three months after the abandonment, send to a Secretary of State an accurate plan showing the boundaries of the workings of the mine or seam up to the time of the abandonment, and the position of the workings with regard to the surfaces, and the general direction and rate of dip of the strata, together with a section of the strata sunk through, or if that is not reasonably practicable, a statement of the depth of the shaft, with a section of the seam. Every such plan must be on a scale of not less than that of the Ordnance Survey of 25 inches to the mile, or on the same scale as the plan used at the mine at the time of its abandonment.

(2.) The plan and section shall be preserved under the care of the Secretary of State; but no person, except an inspector under this Act, shall be entitled, without the consent of the owner of the mine or seam, to see the plan when so sent until after the expiration of ten years from the time of the abandonment.

(3.) The owner aforesaid shall also, within three months of the abandonment of the mine or seam, send to the inspector of the district, on behalf of a Secretary of State, a correct return specifying, with respect to the period which has elapsed since the expiration of the year covered by the last annual return made under this Act, the particulars required in that return; and the provisions of this Act with respect

to the said annual return shall apply to the return so sent.

(4.) If the owner of a mine or seam fails to comply with this section, he shall be guilty of an offence against this Act, and be liable to a fine not exceeding thirty pounds.

(5.) A complaint or information of an offence under this section may be made or laid at any time within six months after abandonment of the mine or seam, or after service on the owner aforesaid, of a notice to comply with the requirements of this section, whichever last happens.

INSPECTION.

Appointment of Inspectors of Mines.

39. (1.) A Secretary of State may from time to time appoint any fit persons to be inspectors (under whatever title he may from time to time fix) of mines, and assign them their duties, and may award them such salaries as the Treasury may approve, and may remove any such inspector: Provided always, that in the appointment of inspectors of mines in Wales and Monmouthshire among candidates, otherwise equally qualified, persons having a knowledge of the Welsh language shall be preferred.

(2.) Notice of the appointment of every such inspector shall be published in the *London Gazette*.

(3.) Every such inspector is referred to in this Act as an inspector, and the inspector of a district means the inspector who is for the time being assigned to the district or portion of the United Kingdom with reference to which the term is used.

(4.) Any person appointed or acting as inspector under the Metaliferous Mines Regulation Act, 1872, if directed by a Secretary of State to act as an inspector under this Act, may so Act, and shall be deemed to be an inspector under this Act.

(5.) The salaries of the inspectors, and the expenses incurred by them or by a Secretary of State in the execution of this Act, shall continue to be paid out of moneys to be provided by Parliament.

Disqualification of Persons as Inspectors.

40. Any person who practises or acts as, or is a partner of any person who practises or acts as a land agent or mining engineer, or as a manager, viewer, agent, or valuer of mines, or arbitrator in any difference arising between owners, agents, or managers of mines, or is otherwise employed in or about any mine, or is a miner's agent or a mine owner (whether the mine is one to which this Act applies or not), shall not act as an inspector of mines under this Act; and no inspector shall be a partner, or have any interest, direct or indirect, in any mine in the district under his charge.

Powers of Inspectors.

41. An inspector under this Act shall have power to do all or any of the following things, namely,—

(i.) To make such examination and inquiry as may be necessary to ascertain whether the provisions of this Act relating to matters above ground or below ground are complied with in the case of any mine.

(ii.) To enter, inspect, and examine any mine, and every part thereof, at all reasonable times by day and night, but so as not to impede or obstruct the working of the mine.

(iii.) To examine into and make inquiry respecting the state and condition of any mine, or any part thereof, and the ventilation of the mine, and the sufficiency of the special rules for the time being in force in the mine, and all matters and things connected with or relating to the safety of the persons employed in or about the mine or any mine contiguous thereto, or the care and treatment of the horses and other animals used in the mine.

(iv.) To exercise such other powers as may be necessary for carrying this Act into effect.

Every person who wilfully obstructs any inspector in the execution of his duty under this Act, and every

owner, agent, and manager of a mine who refuses or neglects to furnish to the inspector the means necessary for making any entry, inspection, examination, or inquiry under this Act, in relation to the mine, shall be guilty of an offence against this Act.

Notice by Inspector of Causes of Danger not expressly provided against.

42. (1.) If in any respect (which is not provided against by any express provision of this Act, or by any special rule) any inspector finds any mine, or any part thereof, or any matter, thing, or practice in or connected with any such mine, or with the control, management, or direction thereof by the manager, to be dangerous or defective, so as in his opinion to threaten or tend to the bodily injury of any person, he may give notice in writing thereof to the owner, agent, or manager of the mine, and shall state in the notice the particulars in which he considers the mine or any part thereof, or any matter, thing, or practice to be dangerous or defective, and require the same to be remedied; and unless the same be forthwith remedied, shall also report the same to a Secretary of State.

(2.) If the owner, agent, or manager of the mine objects to remedy the matter complained of in the notice, he may, within ten days after receipt of the notice, send his objection in writing, stating the grounds thereof, to a Secretary of State; and thereupon the matter shall be determined by arbitration in manner provided by this Act; and the date of the receipt of the objection shall be deemed to be the date of the reference.

(3.) If the owner, agent, or manager fail, when no objection is sent as aforesaid, to comply with the requisition of the notice within ten days after the expiration of the time for objection, or when there has been an arbitration to comply with the award within the time fixed by the award, he shall be guilty of an offence against this Act, and the notice and award shall respectively be deemed to be written notice of the offence:

Provided that the Court, if satisfied that the owner, agent, or manager has taken active measures for complying with the notice or award, but has not, with reasonable diligence, been able to complete the works, may adjourn any proceedings taken before them for punishing the offence, and, if the works are completed within a reasonable time, no penalty shall be inflicted.

(4.) No person shall be precluded by any agreement from doing, or be liable under any contract to any penalty or forfeiture for doing, such acts as may be necessary in order to comply with the provisions of this section.

Annual Reports of Inspectors.

43. Every inspector of a district under this Act shall make an annual report of his proceedings during the preceding year to a Secretary of State, which report shall be laid before both Houses of Parliament.

Special Reports of Inspectors.

44. Where in any mine an explosion or accident has caused loss of life or personal injury to any person, a Secretary of State may at any time direct an inspector to make a special report with respect to the explosion or accident.

Formal Investigation when directed by Secretary of State.

45. Where it appears to a Secretary of State that a formal investigation of any explosion or accident, and of its causes and circumstances, is expedient, the Secretary of State may direct such investigation to be held, and with respect to any such investigation, the following provisions shall have effect:—

- (1.) The Secretary of State may appoint a competent person to hold the investigation, and may appoint any person or persons possessing legal or special knowledge to act as assessor or assessors in holding the investigation.
- (2.) The person or persons so appointed (hereinafter called the court) shall hold the investigation in open court, in such manner and under such condi-

tions as the court may think most effectual for ascertaining the causes and circumstances of the explosion or accident, and enabling the court to make the report in this section mentioned.

(3.) The court shall have for the purpose of the investigation all the powers of a court of summary jurisdiction, when acting as a court, in hearing informations for offences against this Act, and all the powers of an inspector under this Act, and, in addition, the following powers, namely,—

(a) Power to enter and inspect any place or building the entry or inspection whereof appears to the court requisite for the said purpose.

(b) Power, by summons signed by the court, to require the attendance of all such persons as it thinks fit to call before it and examine for the said purpose, and for that purpose to require answers or returns to such inquiries as it thinks fit to make.

(c) Power to require the production of all books, papers, and documents which it considers important for the said purpose.

(d) Power to administer an oath, and require any person examined to make and sign a declaration of the truth of the statements made by him in his examination.

(4.) Persons attending as witnesses before the court shall be allowed such expenses as would be allowed to witnesses attending before a court of record; and in case of dispute as to the amount to be allowed, the same shall be referred by the court to a master of one of Her Majesty's superior courts, who, on request, signed by the court, shall ascertain and certify the proper amount of expenses.

(5.) The court holding an investigation under this section shall

make a report to the Secretary of State, stating the causes of the explosion or accident and its circumstances, and adding any observations which the court thinks right to make.

(6.) All expenses incurred in and about an investigation under this section (including the remuneration of any person appointed to act as assessor) shall be deemed to be part of the expenses of the Secretary of State in the execution of this Act.

(7.) Any person who, without reasonable excuse (proof whereof shall lie on him), either fails, after having had the expenses (if any) to which he is entitled tendered to him, to comply with any summons or requisition of a court holding an investigation under this section, or prevents or impedes the court in the execution of its duty, shall for every such offence be liable to a fine not exceeding ten pounds, and in the case of a failure to comply with a requisition for making any return, or producing any document, shall be liable to a fine not exceeding ten pounds for every day that such failure continues.

Publication of Reports.

46. The Secretary of State may cause any special report of an inspector, or any report of a court under this part of this Act, to be made public at such time and in such manner as he may think fit.

ARBITRATION.

Provisions as to Arbitrations.

47. With respect to arbitrations under this Act, the following provisions shall have effect:—

(1.) The parties to the arbitration are in this section deemed to be the owner, agent, or manager of the mine on the one hand, and the inspector of mines (on behalf of the Secretary of State) on the other.

(2.) Each of the parties to the arbitration may, within fourteen

- days after the date of the reference, appoint an arbitrator.
- (3.) No person shall act as arbitrator or umpire under this Act who is employed in, or in the management of, or is interested in, the mine to which the arbitration relates.
 - (4.) The appointment of an arbitrator under this section shall be in writing, and notice of the appointment shall be forthwith sent to the other party to the arbitration, and shall not be revoked without the consent of that party.
 - (5.) The death, removal, or other change in any of the parties to the arbitration shall not affect the proceedings under this section.
 - (6.) If within the said fourteen days either of the parties fails to appoint an arbitrator, the arbitrator appointed by the other party may proceed to hear and determine the matter in difference, and in that case the award of the single arbitrator shall be final.
 - (7.) If before an award has been made any arbitrator appointed by either party dies or becomes incapable to act, or for seven days refuses or neglects to act, the party by whom such arbitrator was appointed may appoint some other person to act in his place; and if he fails to do so within seven days after notice in writing from the other party for that purpose, the remaining arbitrator may proceed to hear and determine the matter in difference, and in that case the award of the single arbitrator shall be final.
 - (8.) In either of the foregoing cases where an arbitrator is empowered to act singly, on one of the parties failing to appoint, the party so failing may, before the single arbitrator has actually proceeded in the arbitration, appoint an arbitrator, who shall then act as if no failure had occurred.
 - (9.) If the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, or within such extended time (if any) as may have been appointed for that purpose by both arbitrators under their hands, the matter in difference shall be determined by the umpire appointed as hereinafter mentioned.
 - (10.) The arbitrators, before they enter on the matter referred to them, shall appoint by writing under their hands an umpire to decide on points on which they may differ.
 - (11.) If the umpire dies or becomes incapable of acting before he has made his award, or refuses to make his award within a reasonable time after the matter has been brought within his cognizance, the persons or person who appointed such umpire shall forthwith appoint another umpire in his place.
 - (12.) If the arbitrators refuse or fail, or for seven days after the request of either party, neglect to appoint an umpire, then on the application of either party an umpire may be appointed by the chairman of the general or quarter sessions of the peace, within the jurisdiction of which the mine or any shaft of the mine is situate.
 - (13.) The decision of every umpire on the matters referred to him shall be final.
 - (14.) If a single arbitrator fails to make his award within twenty-one days after the day on which he was appointed, the party who appointed him may appoint another arbitrator to act in his place.
 - (15.) Arrangements shall, whenever practicable, be made for the matter in difference being heard at the same time before the arbitrators and the umpire.
 - (16.) The arbitrators and the umpire, or any of them, may examine the parties and their witnesses on oath, and may also consult any counsel, engineer, or scientific person whom they may think it expedient to consult.

(17.) The payment, if any, to be made to any arbitrator or umpire for his services shall be fixed by the Secretary of State, and, together with the costs of the arbitration and award, shall be paid by the parties or one of them according as the award may direct. Such costs may be taxed by a master of one of Her Majesty's superior courts, who, on the written application of either of the parties, shall ascertain and certify the proper amount thereof. The amount, if any, payable by the Secretary of State, shall be paid as part of the expenses of inspectors under this Act. The amount, if any, payable by the owner, agent, or manager, may, in the event of non-payment, be recovered in the same manner as fines under this Act.

(18.) Every person who is appointed an arbitrator under this section shall be a practical mining engineer, or a person accustomed to the working of mines; and every person who is appointed an umpire under this section shall be a county court judge, a police or stipendiary magistrate, a recorder of a borough, or a registrar of a county court; but when an award has been made under this section, the arbitrator or umpire who made it shall be deemed to have been duly qualified as provided by this section.

CORONERS.

Provisions as to Coroners' Inquests on Deaths from Accidents in Mines.

48. With respect to coroners' inquests on the bodies of persons whose death may have been caused by explosions or accidents in or about mines, the following provisions shall have effect:—

(1.) Where a coroner holds an inquest on the body of any person whose death may have been caused by any explosion or accident, of which notice is required by this Act to be given

to the inspector of the district, the coroner shall adjourn the inquest unless an inspector, or some person on behalf of a Secretary of State, is present to watch the proceedings.

(2.) The coroner, at least four days before holding the adjourned inquest, shall send to the inspector for the district notice in writing of the time and place of holding the adjourned inquest.

(3.) The coroner, before the adjournment, may take evidence to identify the body, and may order the interment thereof.

(4.) If an explosion or accident has not occasioned the death of more than one person, and the coroner has sent to the inspector of the district notice of the time and place of holding the inquest at such time as to reach the inspector not less than twenty-four hours before the time of holding the same, it shall not be imperative on him to adjourn the inquest in pursuance of this section, if the majority of the jury think it unnecessary so to adjourn.

(5.) An inspector shall be at liberty at any such inquest to examine any witness, subject, nevertheless, to the order of the coroner.

(6.) Where evidence is given at an inquest at which an inspector is not present of any neglect as having caused or contributed to the explosion or accident, or of any defect in or about the mine appearing to the coroner or jury to require a remedy, the coroner shall send to the inspector of the district notice in writing of such neglect or defect.

(7.) Any person having a personal interest in, or employed in, or in the management of the mine in which the explosion or accident occurred, shall not be qualified to serve on the jury empanelled on the inquest; and it shall be the duty of the constable or other officer not to summon any person disqualified

under this provision, and it shall be the duty of the coroner not to allow any such person to be sworn or to sit on the jury.

- (8.) Any relative of any person whose death may have been caused by the explosion or accident with respect to which the inquest is being held, and the owner, agent, or manager of the mine in which the explosion or accident occurred, and any person appointed by the order in writing of the majority of the workmen employed at the said mine, shall be at liberty to attend and examine any witness, either in person or by his counsel, solicitor, or agent, subject nevertheless to the order of the coroner.

Every person who fails to comply with the provisions of this section shall be guilty of an offence against this Act.

PART II.—RULES.—GENERAL RULES.

General Rules.

49. The following general rules shall be observed, so far as is reasonably practicable, in every mine:—

Ventilation of Mine.

Rule 1. An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables, and workings of the mine, and the travelling roads to and from those working places, shall be in a fit state for working and passing therein.

In the case of mines required by this Act to be under the control of a certificated manager, the quantity of air in the respective splits or currents shall at least once in every month be measured and entered in a book to be kept for the purpose at the mine.

Rule 2. Where a fire is used for ventilation in any mine newly opened after the passing of this Act, the return air, unless it be so diluted as not to be inflammable, shall be carried off clear of the fire by means of a dumb drift or airway.

Rule 3. Where a mechanical contrivance for ventilation is introduced into any mine after the commencement of this Act, it shall be in such position and placed under such conditions as will tend to ensure its being uninjured by an explosion.

Stations and Inspection of Condition as to Ventilation, etc.

Rule 4. A station or stations shall be appointed at the entrance to the mine, or to different parts of the mine, as the case may require; and the following provisions shall have effect:—

- (i.) As to inspection before commencing work:—

A competent person or competent persons appointed by the owner, agent, or manager for the purpose not being contractors for getting minerals in the mine, shall, within such time immediately before the commencement of each shift as shall be fixed by special rules made under this Act, inspect every part of the mine situate beyond the station or each of the stations, and in which workmen are to work or pass during that shift, and shall ascertain the condition thereof so far as the presence of gas ventilation, roof and sides, and general safety are concerned.

No workman shall pass beyond any such station until the part of the mine beyond that station has been so examined and stated by such competent person to be safe.

The inspection shall be made with a locked safety lamp, except in the case of any mine in which inflammable gas has not been found within the preceding twelve months.

A report specifying where noxious or inflammable gas, if any, was found present, and what defects (if any) in roofs or sides, and what (if any) other source of danger were or was observed, shall be recorded without delay in a book to be kept at the mine for the purpose, and accessible to the workmen, and such report shall be signed by, and so far as the same does not consist of printed matter, shall be in the handwriting of the person who made the inspection.

For the purpose of the foregoing provisions of this rule, two or more shifts succeeding one another without any interval are to be deemed to be one shift.

(ii.) As to inspection during shifts:—

A similar inspection shall be made in the course of each shift of all parts of the mine in which workmen are to work or pass during that shift, but it shall not be necessary to record a report of the same in a book: Provided that in the case of a mine worked continuously throughout the twenty-four hours by a succession of shifts, the report of one of such inspections shall be recorded in manner above required.

Inspection of Machinery, etc., above and below Ground.

Rule 5. A competent person or competent persons appointed by the owner, agent, or manager for the purpose, shall, once at least in every twenty-four hours, examine the state of the external parts of the machinery, the state of the guides and conductors in the shafts, and the state of the head gear, ropes, chains, and other similar appliances of the mine which are in actual use both above ground and below ground, and shall once at least in every week examine the state of the shafts by which persons ascend or descend; and shall make a true report of the result of such examination; and every such report shall be recorded without delay in a book to be kept at the mine for the purpose, and shall be signed by the person who made the inspection.

Fencing of Entrances.

Rule 6. Every entrance to any place which is not in actual use or course of working and extension, shall be properly fenced across the whole width of the entrance, so as to prevent persons inadvertently entering the same.

Withdrawal of Workmen in Case of Danger.

Rule 7. If at any time it is found by the person for the time being in charge of the mine, or any part thereof, that by reason of inflam-

mable gases prevailing in the mine, or that part thereof, or of any cause whatever, the mine or that part is dangerous, every workman shall be withdrawn from the mine or part so found dangerous, and a competent person appointed for the purpose shall inspect the mine or part so found dangerous, and if the danger arises from inflammable gas shall inspect the mine or part with a locked safety lamp; and in every case shall make a true report of the condition of the mine or part; and a workman shall not, except in so far as is necessary for inquiring into the cause of danger or for the removal thereof, or for exploration, be readmitted into the mine or part so found dangerous, until the same is stated by the person appointed as aforesaid not to be dangerous. Every such report shall be recorded in a book which shall be kept at the mine for the purpose, and shall be signed by the person who made the inspection.

Use of Safety Lamps in certain Places.

Rule 8. No lamp or light other than a locked safety lamp shall be allowed or used—

- (a) In any place in a mine in which there is likely to be any such quantity of inflammable gas as to render the use of naked lights dangerous; or
- (b) In any working approaching near a place in which there is likely to be an accumulation of inflammable gas.

And when it is necessary to work the coal in any part of a ventilating district with safety lamps, it shall not be allowable to work the coal with naked lights in another part of the same ventilating district situated between the place where such lamps are being used and the return airway.

Construction of Safety Lamps.

Rule 9. Wherever safety lamps are used, they shall be so constructed that they may be safely carried against the air current ordinarily prevailing in that part of the mine in which the lamps are for the

time being in use, even though such current should be inflammable.

Examination of Safety Lamps.

Rule 10. In any mine or part of a mine in which safety lamps are required by this Act, or by the special rules made in pursuance of this Act to be used,—

- (i.) A competent person appointed by the owner, agent, or manager for the purpose, shall, either at the surface or at the appointed lamp station, examine every safety lamp immediately before it is taken into the workings for use, and ascertain it to be in safe working order and securely locked; and such lamps shall not be used until they have been so examined and found in safe working order and securely locked.
- (ii.) A safety lamp shall not be unlocked, except either at the appointed lamp station or for the purpose of firing a shot, in conformity with the provisions hereinafter contained.
- (iii.) A person, unless he has been appointed either for the purpose of examining safety lamps, or for the purpose of firing shots, shall not have in his possession any contrivance for opening the lock of any safety lamp.
- (iv.) A person shall not have in his possession any lucifer match or apparatus of any kind for striking a light, except within a completely closed chamber attached to the fuse of the shot.

Lamp Stations.

Rule 11. Where safety lamps are required to be used, the position of the lamp stations for lighting or re-lighting the lamps shall not be in the return air.

Use of Explosives below Ground.

Rule 12. Any explosive substance shall only be used in the mine below ground as follows:—

- (a) It shall not be stored in the mine:

- (b) It shall not be taken into the mine, except in cartridges in a secure case or canister containing not more than five pounds:

Provided that on the application of the owner, agent, or manager of any mine, the Secretary of State may by order exempt such mine from so much of this rule as forbids taking an explosive substance into the mine except in cartridges.

- (c) A workman shall not have in use at one time in any one place more than one of such cases or canisters.
- (d) In the process of charging or stemming for blasting, a person shall not use or have in his possession any iron or steel pricker, scraper, charger, tamping-rod, or stemmer, nor shall coal or coal dust be used for tamping.
- (e) No explosive shall be forcibly pressed into a hole of insufficient size; and when a hole has been charged, the explosive shall not be unrammed; and no hole shall be bored for a charge at a distance of less than 6 inches from any hole where the charge has missed fire.
- (f) In any place in which the use of a locked safety lamp is for the time being required by or in pursuance of this Act, or which is dry and dusty, no shot shall be fired except by or under the direction of a competent person appointed by the owner, agent, or manager of the mine, and such person shall not fire the shot or allow it to be fired until he has examined both the place itself where the shot is to be fired, and all contiguous accessible places of the same seam within a radius of 20 yards, and has found such place safe for firing.
- (g) If in any mine, at either of the four inspections under Rule 4 recorded last, before a shot is to be fired, inflammable gas has been reported to be present in

the ventilating district in which the shot is to be fired, the shot shall not be fired—

- (1.) Unless a competent person, appointed as aforesaid, has examined the place where gas has been so reported to be present, and has found that such gas has been cleared away, and that there is not at or near such place sufficient gas issuing or accumulated to render it unsafe to fire the shot; or
 - (2.) Unless the explosive employed in firing the shot is so used with water or other contrivance as to prevent it from inflaming gas, or is of such a nature that it cannot inflame gas.
- (h) If the place where a shot is to be fired is dry and dusty, then the shot shall not be fired unless one of the following conditions is observed, that is to say,—
- (1.) Unless the place of firing and all contiguous accessible places within a radius of 20 yards therefrom are at the time of firing in a wet state from thorough watering or other treatment equivalent to watering, in all parts where dust is lodged, whether roof, floor, or sides; or
 - (2.) In the case of places in which watering would injure the roof or floor, unless the explosive is so used with water or other contrivance as to prevent it from inflaming gas or dust, or is of such a nature that it cannot inflame gas or dust.
- (i) If such dry and dusty place is part of a main haulage road, or is a place contiguous thereto, and showing dust adhering to the roof and sides, no shot shall be fired there unless—

- (1.) Both the conditions mentioned in sub-head (h) have been observed; or
 - (2.) Unless such one of the conditions mentioned in sub-head (h) as may be applicable to the particular place has been observed, and, moreover, all workmen have been removed from the seam in which the shot is to be fired, and from all seams communicating with the shaft on the same level, except the men engaged in firing the shot, and such other persons, not exceeding ten, as are necessarily employed in attending to the ventilating furnaces, steam boilers, engines, machinery, winding apparatus, signals, or horses, or in inspecting the mine.
- (k) In this Act “ventilating district” means such part of a seam as has an independent intake commencing from a main intake air course, and an independent return airway terminating at a main return air course; and “main haulage road” means a road which has been, or for the time being is, in use for moving trams by steam or other mechanical power.
- (l) Where a seam of a mine is not divided into separate ventilating districts, the provisions in this Act relating to ventilating districts shall be read as though the word “seam” were substituted for the words “ventilating district.”
- (m) So much of this rule as requires the explosive substance taken into the mine to be in cartridges, and so much of the provisions of sub-head (f) as relates to a dry and dusty place, and the provisions (g), (h), (i), (k), and (l) shall not apply to seams of clay or stratified ironstone which are not worked in connection with any coal seam, and which contain no coal in the working.

Water and Bore-Holes.

Rule 13. Where a place is likely to contain a dangerous accumulation of water, the working approaching that place shall not at any point within 40 yards of that place exceed 8 feet in width; and there shall be constantly kept at a sufficient distance, not being less than 5 yards, in advance, at least one bore-hole near the centre of the working, and sufficient flank bore-holes on each side.

Signalling and Man-Holes for travelling Planes worked by Machinery.

Rule 14. Every underground plane on which persons travel, which is self-acting or worked by an engine, windlass, or gin, shall be provided (if exceeding 30 yards in length) with some proper means of communicating distinct and definite signals between the stopping-places and the ends of the plane, and shall be provided in every case with sufficient man-holes for places of refuge, at intervals of not more than 20 yards, or if there is not room for a person to stand between the side of a tub and the side of the plane, then (unless the tubs are moved by an endless chain or rope) at intervals of not more than 10 yards.

Man-Holes for other travelling Roads.

Rule 15. Every road on which persons travel underground where the load is drawn by a horse or other animal, shall be provided, at intervals of not more than 50 yards, with sufficient man-holes, or with places of refuge; and every such place of refuge shall be of sufficient length, and at least 3 feet in width, between the waggons running on the road and the side of such road. There shall be at least two proper travelling ways into every steam-engine room and boiler gallery.

Man-Holes to be kept clear.

Rule 16. Every man-hole and every place of refuge shall be constantly kept clear, and no person shall place anything in any such man-hole or place of refuge.

Dimensions of travelling Roads.

Rule 17. Every travelling road on which a horse or other draught animal is used underground shall be of sufficient dimensions to allow the horse or other animal to pass without rubbing against the roof or timbering.

Fencing of Old Shafts.

Rule 18. The top of every shaft which for the time being is out of use, or used only as an air shaft, shall be and shall be kept securely fenced.

Fencing of Entrances to Shafts.

Rule 19. The top and all entrances between the top and bottom, including the sump, if any, of every working, ventilating, or pumping shaft, shall be properly fenced, but this shall not be taken to forbid the temporary removal of the fence for the purpose of repairs or other operations, if proper precautions are used.

Securing of Shafts.

Rule 20. Where the natural strata are not safe, every working or pumping shaft shall be securely cased, lined, or otherwise made secure.

Securing of Roofs and Sides.

Rule 21. The roof and sides of every travelling road and working place shall be made secure; and a person shall not, unless appointed for the purpose of exploring or repairing, travel or work in any such travelling road or working place which is not so made secure.

Timbering.

Rule 22. Where the timbering of the working places is done by the workmen employed therein, suitable timber shall be provided at the working place, gate end, pass by, siding, or other similar place in the mine convenient to the workmen; and the distance between the sprags or holing props where they are required shall not exceed 6 feet or such less distance as may be ordered by the owner, agent, or manager.

Option of using Downcast Shaft.

Rule 23. Where there is a downcast and furnace shaft to the same seam, and both such shafts are provided with apparatus in use for raising and lowering persons, every person employed in the mine shall, on giving reasonable notice, have the option of using the downcast shaft.

Attendance of Engineman.

Rule 24. In any mine which is usually entered by means of machinery, a competent male person not less than twenty-two years of age shall be appointed for the purpose of working the machinery which is employed in lowering and raising persons therein, and shall attend for that purpose during the whole time that any person is below ground in the mine.

Where any shaft, plane, or level is used for the purpose of communication from one part to another part of a mine, and persons are taken up or down or along such shaft, plane, or level by means of any engine, windlass, or gin, driven or worked by steam or any mechanical power, or by an animal, or by manual labour, the person in charge of such engine, windlass, or gin, or of any part of the machinery, ropes, chains, or tackle connected therewith, must be a competent male person not less than eighteen years of age.

Where the machinery is worked by an animal, the person under whose direction the driver of the animal acts shall, for the purposes of this rule, be deemed to be the person in charge of the machinery.

Means of Signalling for Working Shafts.

Rule 25. Every working shaft used for the purpose of drawing minerals, or for the lowering or raising of persons, shall, if exceeding 50 yards in depth, and not exempted in writing by the inspector of the district, be provided with guides and some proper means of

communicating distinct and definite signals from the bottom of the shaft and from every entrance for the time being in use between the surface and the bottom of the shaft to the surface, and from the surface to the bottom of the shaft and to every entrance for the time being in use between the surface and the bottom of the shaft.

Rule 26. If in any mine the winding apparatus is not provided with some automatic contrivance to prevent overwinding, then the cage, when men are being raised, shall not be wound up at a speed exceeding three miles an hour, after the cage has reached a point in the shaft to be fixed by the special rules.

Cover overhead.

Rule 27. A sufficient cover overhead shall be used for every cage or tub employed in lowering or raising persons in any working shaft, except where the cage or tub is worked by a windlass, or where persons are employed at work in the shaft, or where a written exemption is given by the inspector of the district.

Chains.

Rule 28. A single linked chain shall not be used for lowering or raising persons in any working shaft or plane except for the short coupling chain attached to the cage or tub.

Prevention of Rope slipping on Drum.

Rule 29. There shall be on the drum of every machine used for lowering or raising persons, such flanges or horns, and also if the drum is conical, such other appliances as may be sufficient to prevent the rope from slipping.

Break and Indicator.

Rule 30. There shall be attached to every machine worked by steam, water, or mechanical power, and used for lowering or raising persons, an adequate break or breaks, and a proper indicator (in addition to any mark on the rope) showing to the

person who works the machine the position of the cage or tub in the shaft.

If the drum is not on the crank shaft, there shall be an adequate break on the drum shaft.

Fencing Machinery.

Rule 31. Every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine shall be and shall be kept securely fenced.

Safety Valves and Gauges for Boilers.

Rule 32. Each steam boiler, whether separate or one of a range, shall have attached to it a proper safety valve, and also a proper steam gauge and water gauge, to show respectively the pressure of steam and the height of water in each boiler.

Barometer, etc.

Rule 33. A barometer and thermometer shall be placed above ground in a conspicuous position near the entrance to the mine.

Stretchers.

Rule 34. Where persons are employed underground, ambulances or stretchers, with splints and bandages, shall be kept at the mine ready for immediate use in case of accident.

Wilful Damage.

Rule 35. No person shall wilfully damage, or without proper authority remove under useless, any fence, fencing, man-hole, place of refuge, casing, lining, guide, means of signalling, signal, cover, chain, flange, horn, break, indicator, steam gauge, water gauge, safety valve, or other appliance or thing provided in any mine in compliance with this Act.

Observance of Directions.

Rule 36. Every person shall observe such directions with respect to working as may be given to him with a view to comply with this Act or the special rules in force in the mine.

Books and Copies thereof.

Rule 37. The books mentioned in these rules shall be provided by the owner, agent, or manager, and the books, or a correct copy thereof, shall be kept at the office at the mine, and any inspector under this Act, and any person employed in the mine, or any one having the written authority of any inspector or person so employed, may at all reasonable times inspect and take copies of and extracts from any such books; but nothing in these rules shall be construed to impose the obligation of keeping any such book or a copy thereof for more than twelve months after the book has ceased to be used for entries therein under this Act.

Any report by this Act required to be recorded in a book may be partly in print (including lithograph) and partly in writing.

Periodical Inspection on behalf of Workmen.

Rule 38. The persons employed in a mine may from time to time appoint two of their number or any two persons, not being mining engineers, who are practical working miners, to inspect the mine at their own cost, and the persons so appointed shall be allowed once at least in every month, accompanied, if the owner, agent, or manager of the mine thinks fit, by himself or one or more officers of the mine, to go to every part of the mine, and to inspect the shafts, levels, planes, working places, return air-ways, ventilating apparatus, old workings, and machinery. Every facility shall be afforded by the owner, agent, and manager, and all persons in the mine for the purpose of the inspection, and the persons appointed shall forthwith make a true report of the result of the inspection, and that report shall be recorded in a book to be kept at the mine for the purpose, and shall be signed by the persons who made the inspection; and if the report state the existence or apprehended existence of any danger, the owner, agent, or manager shall

forthwith cause a true copy of the report to be sent to the inspector of the district.

Rule 39. No person not now employed as a coal or ironstone getter shall be allowed to work alone as a coal or ironstone getter in the face of the workings until he has had two years' experience of such work under the supervision of skilled workmen, or unless he shall have been previously employed for two years in or about the face of the workings of a mine.

Penalty on Non-compliance with Rules.

50. Every person who contravenes or does not comply with any of the general rules in this Act, shall be guilty of an offence against this Act; and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, the owner, agent, or manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance.

SPECIAL RULES.

Special Rules for every Mine.

51. (1.) There shall be established in every mine such rules (referred to in this Act as special rules) for the conduct and guidance of the persons acting in the management of such mine or employed in or about the mine as, under the particular state and circumstances of such mine, may appear best calculated to prevent dangerous accidents, and to provide for the safety, convenience, and proper discipline of the persons employed in or about the mine.

(2.) Such special rules, when established, shall be signed in duplicate by the inspector who is inspector of the district at the time the rules are established, and shall be observed in and about every such mine (in-

cluding any extension thereof) in the same manner as if they were enacted in this Act.

(3.) If any person who is bound to observe the special rules established for any mine, acts in contravention of or fails to comply with any of them, he shall be guilty of an offence against this Act, and also the owner, agent, and manager of such mine shall each be guilty of an offence against this Act unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the rules as regulations for the working of the mine, so as to prevent such contravention or non-compliance.

Establishment of new Special Rules.

52. (1.) The owner, agent, or manager of every mine shall frame and transmit to the inspector of the district, for approval by a Secretary of State, special rules for the mine within three months after the commencement of this Act, or within three months after the commencement (if subsequent to the commencement of this Act) of any working for the purpose of opening a new mine or of renewing the working of an old mine.

(2.) The proposed special rules, together with a printed notice specifying that any objection to the rules on the ground of anything contained therein or omitted therefrom may be sent by any of the persons employed in the mine to the inspector of the district, at his address, stated in the notice, shall, during not less than two weeks before the rules are transmitted to the inspector, be posted up in like manner as is provided in this Act respecting the publication of special rules for the information of persons employed in the mine, and a certificate that the rules and notice have been so posted up shall be sent to the inspector with two copies of the rules, signed by the person sending the same.

(3.) If the rules are not objected to by the Secretary of State within forty days after their receipt by the inspector, they shall be established.

Secretary of State may object to Special Rules.

53. (1.) If the Secretary of State is of opinion that the proposed special rules so transmitted, or any of them, do not sufficiently provide for the prevention of dangerous accidents in the mine, or for the safety or convenience of the persons employed in or about the mine, or are unreasonable, he may, within forty days after the rules are received by the inspector, object to the rules, and propose to the owner, agent, or manager in writing any modifications in the rules by way either of omission, alteration, substitution, or addition.

(2.) If the owner, agent, or manager does not, within twenty days after the modifications proposed by the Secretary of State are received by him, object in writing to them, the proposed special rules, with those modifications, shall be established.

(3.) If the owner, agent, or manager sends his objection in writing within the said twenty days to the Secretary of State, the matter shall be referred to arbitration under this Act, and the date of the receipt of the objection by the Secretary of State shall be deemed to be the date of the reference, and the rules shall be established as settled by an award on arbitration.

Amendment of Special Rules.

54. (1.) After special rules are established under this Act in any mine, the owner, agent, or manager of the mine may from time to time propose in writing to the inspector of the district, for the approval of the Secretary of State, any amendment of the rules or any new special rules, and the provisions of this Act with respect to the original special rules shall apply to all such amendments and new rules in like manner, as nearly as may be, as they apply to the original rules.

(2.) A Secretary of State may from time to time propose in writing to the owner, agent, or manager of the mine any new special rules, or any amendment of the special rules,

and the provisions of this Act with respect to a proposal of a Secretary of State for modifying the special rules transmitted by the owner, agent, or manager of a mine shall apply to all such new special rules and amendments in like manner, as nearly as may be, as they apply to the proposal.

False Statements, and Neglect to transmit Special Rules.

55. If the owner, agent, or manager of any mine makes any false statement with respect to the posting up of the rules and notices, he shall be guilty of an offence against this Act; and if special rules for any mine are not transmitted within the time limited by this Act to the inspector for the approval of a Secretary of State, the owner, agent, and manager of such mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by enforcing to the best of his power the provisions of this Act, to secure the transmission of the rules.

Certified Copy of Special Rules to be Evidence.

56. An inspector under this Act shall, when required, certify a copy which is shown to his satisfaction to be a true copy of any special rules which for the time being are established under this Act in any mine, and a copy so certified shall be evidence (but not to the exclusion of other proof) of such special rules, and of the fact that they are duly established under this Act and have been signed by the inspector.

PUBLICATION OF ABSTRACT OF ACT AND OF SPECIAL RULES.

Publication of Abstract of Act and Copy of Special Rules.

57. For the purpose of making known the provisions of this Act and the special rules to all persons employed in and about each mine, an abstract of this Act supplied, on the application of the owner, agent, or manager of the mine, by the inspec-

tor of the district on behalf of a Secretary of State, and a correct copy of all the special rules shall be published as follows:—

- (1.) The owner, agent, or manager of the mine shall cause the abstract and copy of the rules, with the name of the mine and the name and address of the inspector of the district, and the name of the owner or agent and of the manager appended thereto, to be posted up in legible characters, in some conspicuous place at or near the mine, where they may be conveniently read by the persons employed; and so often as the same become defaced, obliterated, or destroyed, shall cause them to be renewed with all reasonable despatch.
- (2.) The owner, agent, or manager shall supply a printed copy of the abstract and the special rules gratis to each person employed in or about the mine who applies for a copy at the office at which the persons immediately employed by the owner, agent, or manager are paid.
- (3.) Every copy of the special rules shall be kept distinct from any rules which depend only on the contract between the employer and employed.

In the event of any non-compliance with the provisions of this section by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act; but the owner, agent, or manager of such mine shall not be deemed guilty if he proves that he had taken all reasonable means, by enforcing to the best of his power the observance of this section, to prevent such non-compliance.

Pulling down or defacing Notices.

58. Every person who pulls down, injures, or defaces any abstract, notice, proposed special rules, or special rules when posted up in pursuance of the provisions of this Act, or any notice posted up in pursuance of the special rules, shall be guilty of an offence against this Act.

PART III.—SUPPLEMENTAL.

LEGAL PROCEEDINGS.

Penalty for Offences against Act.

59. (1.) Every person employed in or about a mine, other than an owner, agent, or manager, who is guilty of any act or omission which in the case of an owner, agent, or manager would be an offence against this Act, shall be deemed to be guilty of an offence against this Act.

(2.) Every person who is guilty of an offence against this Act for which a penalty is not expressly prescribed, shall be liable to a fine not exceeding, if he is an owner, agent, or manager, or under-manager, twenty pounds, and if he is any other person, two pounds, for each offence; and if an inspector has given written notice of any such offence, to a further fine not exceeding one pound for every day after such notice that such offence continues to be committed.

Imprisonment for Wilful Neglect endangering Life or Limb.

60. Where a person who is an owner, agent, manager, or under-manager of, or a person employed in or about a mine, is guilty of any offence against this Act which, in the opinion of the court that tries the case, is one which was reasonably calculated to endanger the safety of the persons employed in or about the mine, or to cause serious personal injury to any of such persons, or to cause a dangerous accident, and was committed wilfully by the person act, personal default, or personal negligence of the person accused, such person shall be liable, if the court is of opinion that a fine will not meet the circumstances of the case, to imprisonment, with or without hard labour, for a period not exceeding three months.

Summary Proceedings for Offences, Fines, etc.

61. (1.) All offences under this Act not declared to be misdemeanours,

and all fines under this Act, and all money and cost by this Act directed to be recovered as fines, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts before a court of summary jurisdiction.

(2.) Proceedings for the removal of a check weigher shall be deemed to be a matter on which a court of summary jurisdiction has authority by law to make an order in pursuance of the Summary Jurisdiction Acts; and summary orders under this Act may be made on complaint before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.

General Provisions as to Summary Proceedings.

62. In every part of the United Kingdom the following provisions shall have effect :—

- (i.) Any complaint or information made or laid in pursuance of this Act shall (save as otherwise expressly provided by this Act) be made or laid within three months from the time when the matter of the complaint or information arose.
- (ii.) Any person charged with any offence under this Act may, if he thinks fit, be sworn and examined as an ordinary witness in the case.
- (iii.) The court shall, if required by either party, cause minutes of the evidence to be taken and preserved.

Appeal to Quarter Sessions.

63. If any person feels aggrieved by any conviction made by a court of summary jurisdiction on determining any information under this Act, by which conviction, imprisonment, or a fine amounting to or exceeding one half the maximum fine, is adjudged, he may appeal therefrom to a court of quarter sessions in manner provided by the Summary Jurisdiction Acts.

Liability for Misrepresentation as to Age, etc.

64. If it appears that a boy or girl was employed on the representation of his or her parent or guardian that he or she was of the age at which his or her employment would not be in contravention of this Act, and under the belief in good faith that he or she was of that age, or that a person has worked alone as a coal or iron-stone getter on his representation that he has had two years' experience of such work under the supervision of skilled workmen, or that he has been previously employed for two years in or about the face of the workings of a mine, and under the belief in good faith that he has had such experience or has been so previously employed, the owner, agent, or manager of the mine and employer shall be exempted from any penalty, and the parent or guardian, or the person who has so worked alone, as the case may be, shall, for the misrepresentation, be deemed guilty of an offence against this Act.

Prosecution of Owners, Agents, Managers, etc.

65. No prosecution shall be instituted against the owner, agent, manager, or under-manager of a mine for any offence under this Act, not committed personally by such owner, agent, manager, or under-manager, which can be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of a Secretary of State; and in the case of any offence of which the owner, agent, manager, or under-manager of a mine is not guilty if he proves that he had taken all reasonable means to prevent the commission thereof, an inspector shall not institute any prosecution against such owner, agent, manager, or under-manager, if satisfied that he had taken such reasonable means as aforesaid. No prosecution shall be instituted against a coroner for any offence under this Act except with the consent in writing of a Secretary of State.

*Report of Result of Proceedings
against Workmen.*

66. Where the owner, agent, or manager of a mine has taken proceedings under this Act against any person employed in or about a mine in respect of an offence committed under this Act, he shall, within twenty-one days after the hearing of the case, report the result thereof to the inspector of the district.

*Summary Proceedings for Offences
in Scotland.*

67. In Scotland the following provisions shall have effect:—

- (1.) The court of summary jurisdiction, when hearing and determining an information or complaint, shall be the sheriff.
- (2.) All jurisdictions, powers, and authorities necessary for the court of summary jurisdiction under this Act are hereby conferred on that court.
- (3.) Every person found liable under this Act by a court of summary jurisdiction in any fine, or to pay any money or costs by this Act directed to be recovered as fines, shall be liable in default of immediate payment to be imprisoned for a term not exceeding three months, and the conviction and warrant may be in the form of No. 3 of Schedule K of the Summary Procedure Act, 1864.
- (4.) Any fine exceeding fifty pounds shall be recovered and enforced in the same manner in which any penalty due to Her Majesty under any Act of Parliament may be recovered and enforced.
- (5.) An appeal shall not lie from any conviction made by a sheriff, save to the next circuit court, or where there are no circuit courts, to the High Court of Justiciary at Edinburgh, in the manner prescribed by such of the provisions of the Act of the twentieth year of the reign of King George the Second, chapter forty-three, and any Acts amending the same, as

relate to appeals in matters criminal, and by and under the rules, limitations, conditions, and restrictions contained in the said provisions.

*Saving for Proceedings under other
Acts.*

68. (1.) Nothing in this Act shall prevent any person from being indicted or liable under any other Act or otherwise to any other or higher penalty or punishment than is provided for any offence by this Act, so, however, that no person be punished twice for the same offence.

(2.) If the court before whom a person is charged with an offence under this Act think that proceedings ought to be taken against such person for such offence under any other Act or otherwise, the court may adjourn the case to enable such proceedings to be taken.

*Owner of Mine, etc., not to act as
Justice, etc., in Proceedings under
this Act.*

69. A person who is the owner, agent, or manager of any mine, or a miner or miner's agent, or the father, son, or brother, or father-in-law, son-in-law, or brother-in-law of such owner, agent, or manager, or of a miner or miner's agent, or who is a director of a company being the owner of a mine, shall not, except with the consent of both parties to the case, act as a court, or member of a court of summary jurisdiction in respect of any offence under this Act.

Application of Fines.

70. Where a fine is imposed under this Act for neglecting to send a notice of any explosion or accident, or for any offence against this Act which has occasioned loss of life or personal injury, a Secretary of State may (if he thinks fit) direct such fine to be paid to or distributed among the persons injured, and the relatives of any persons whose death may have been occasioned by the explosion, accident, or offence, or among some of them :

Provided that—

(i.) Such persons did not in his opinion occasion, or contribute to occasion, the explosion or accident, and did not commit, and were not parties to committing, the offence :

(ii.) The fact of the payment or distribution shall not in any way affect or be receivable as evidence in any legal proceeding relative to or consequential on the explosion, accident, or offence :

Save as aforesaid—

All fines recoverable in England or Scotland under this Act shall be paid into the receipt of Her Majesty's Exchequer, and shall be carried to the Consolidated Fund ;

All fines recovered in Ireland under this Act shall be applied in manner directed by the Fines Act (Ireland), 1851, and any Act amending the same.

MISCELLANEOUS.

Decision of Question whether a Mine is under this Act.

71. If any question arises (otherwise than in legal proceedings) whether a mine is a mine to which this Act or the Metalliferous Mines Regulation Act, 1872, or any other Act for the time being in force and relating to metalliferous mines applies, the question shall be referred to a Secretary of State, whose decision thereon shall be final.

Powers of Secretary of State as to making and revoking Orders.

72. Any order of or exemption granted by a Secretary of State under this Act may be made, and from time to time revoked, or altered by a Secretary of State, either unconditionally or subject to such conditions as he may see fit, and shall be signed by a Secretary of State or under secretary or assistant under secretary.

Service of Notices.

73. All notices under this Act shall (unless expressly required to be

in print) be in either writing or print (including lithograph), or partly in writing and partly in print (including lithograph), and all notices and documents required by this Act to be served or sent by or to an inspector may be either delivered personally, or served and sent by post by a prepaid letter ; and, if served or sent by post, shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post ; and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post.

Application of 38 & 39 Vict. c. 55, sec. 38.

74. Section thirty-eight of the Public Health Act, 1875 (which relates to privy accommodation for any house used as a factory or building in which both sexes are employed), shall apply to the portions of a mine which are above ground, and in which girls and women are employed, in like manner as if it were herein re-enacted with the substitution of "those portions of the mine" for the house in the said section mentioned.

Interpretation of Terms.

75. In this Act, unless the context otherwise requires,—

"Mine" includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine.

"Shaft" includes pit.

"Plan" includes a correct copy or tracing of any original plan.

"Owner," when used in relation to any mine, means any person or body corporate who is the immediate proprietor or lessee, or occupier of any mine, or of any part thereof, and does not

include a person or body corporate who merely receives a royalty, rent, or fine from a mine, or is merely the proprietor of a mine subject to any lease, grant, or licence for the working thereof, or is merely the owner of the soil, and not interested in the minerals of the mine; but any contractor for the working of any mine, or any part thereof, shall be subject to this Act in like manner as if he were an owner, but so as not to exempt the owner from any liability.

"Agent," when used in relation to any mine, means any person appointed as the representative of the owner in respect of any mine, or of any part thereof, and as such superior to a manager appointed in pursuance of this Act.

"Secretary of State" means one of Her Majesty's principal Secretaries of State.

"The Treasury" means the Commissioners of Her Majesty's Treasury.

"Boy" means a male under the age of sixteen years.

"Girl" means a female under the age of sixteen years.

"Woman" means a female of the age of sixteen years or upwards.

Application of Act to Scotland.

76. In the application of this Act to Scotland—

(1.) The term "Attorney-General" means the Lord Advocate.

(2.) The term "injunction" means interdict.

(3.) The term "misdemeanour" means "crime and offence."

(4.) The term "chairman of quarter sessions" means the sheriff of the county.

(5.) The term "sheriff" includes sheriff-substitute.

(6.) The term "attending on subpoena before a court of record" means attending on citation the Court of Justiciary.

(7.) The auditor of the sheriff court of the county or district of a county in which any inquiry takes place shall perform the duties of a master of one of the superior courts under this Act.

(8.) "County court judge, police magistrate, stipendiary magistrate, recorder, or registrar of a county court" means a sheriff or sheriff-substitute.

(9.) Notices of explosions, accidents, loss of life, or personal injury shall be deemed to be sent to the inspector of the district on behalf of the Lord Advocate.

(10.) Sections forty-one and sixteen of the Public Health (Scotland) Act, 1867, shall respectively be substituted for sections thirty-eight and ninety-one of the Public Health Act, 1875.

(11.) The term "public elementary school" means State-aided school.

Nothing in this Act shall affect any provision in the Education (Scotland) Acts, 1872 to 1883.

Application of Act to Ireland.

77. In the application of this Act to Ireland,—

(a) The expression "the Summary Jurisdiction Acts" means, as regards the Dublin metropolitan police district, the Acts regulating the powers and duties of justices of the peace and of the police of that district, and elsewhere, in Ireland, the Petty Sessions (Ireland) Act, 1851, and the Acts amending the same.

(b) In hearing and determining a charge under this Act, a court of summary jurisdiction elsewhere than in the Dublin metropolitan police district, shall be constituted of two or more justices of the peace or of a resident magistrate, with or without other justices, sitting in petty sessions; and a resident magistrate means a magistrate appointed pursuant to the

Act of the session of the sixth and seventh years of the reign of King William the Fourth, chapter fourteen.

(c) Sections forty-eight and one hundred and seven of the Public Health (Ireland) Act, 1878, shall respectively be substituted for sections thirty-eight and ninety-one of the Public Health Act, 1875.

(d) The expression "police or stipendiary magistrate" means resident magistrate.

"Master of one of Her Majesty's Superior Courts" means a taxing master of the High Court of Justice in Ireland.

"Registrar of a county court" means clerk of the peace.

"*London Gazette*" means *Dublin Gazette*.

"Attorney - General" means Attorney-General for Ireland.

"Chairman of quarter sessions" means county court judge.

TRANSITORY PROVISIONS AND REPEAL.

Existing Inspectors and Examining Boards continued.

78. The persons who at the commencement of this Act are acting as inspectors under the Acts hereby repealed, and the boards for appointing examiners for managers' certificates under those Acts, shall continue to act in the same manner, and generally to be in the same position, as if they had been respectively appointed under this Act.

Existing Certificates and Registers continued.

79. All orders made by a Secretary of State under any Act repealed by this Act, which are in force immediately before the commencement of this Act, shall be deemed to have been made under this Act; and all certificates of competency or of service granted under any Act repealed by this Act which are in force immediately before the commencement of this Act, shall be deemed to

be first-class certificates granted under this Act; and the register of holders of certificates, and the other registers which at the commencement of this Act are kept in pursuance of the Acts hereby repealed, shall be deemed to be registers or parts of registers kept in pursuance of this Act.

Grant of Certificates of Service in case of certain Under-Managers.

80. (1.) A certificate of service shall be granted by a Secretary of State to every person who satisfies him either that before the passing of this Act he was exercising, and has since that date exercised, or that he has at any time within five years before the passing of this Act for a period of not less than twelve months exercised, functions substantially corresponding to those of an under-manager in a mine.

(2.) Every such certificate of service shall contain particulars of the name, place, and time of birth, and the length and nature of the previous service of the person to whom the same is delivered, and a certificate of service may be refused to any person who fails to give a full and satisfactory account of the particulars aforesaid, or to pay such registration fee as the Secretary of State may direct, not exceeding that mentioned in the Second Schedule to this Act.

(3.) A certificate of service granted under this section shall have the same effect for the purposes of this Act as a second-class certificate of competency granted under this Act.

Existing Special Rules continued.

81. The special rules which at the commencement of this Act are in force under any Act hereby repealed in any mine shall continue to be the special rules in such mine until special rules are established under this Act for such mine, and while they so continue shall be of the same force as if they were established under this Act.

Temporary Saving for Employment of Boys and Girls between Ten and Twelve.

82. The provisions of this Act shall not—

- (a) Prevent a boy under the age of twelve years who, before the commencement of this Act, is lawfully employed in any mine below ground from continuing to be employed in a mine; nor
 - (b) Prevent a boy or girl who, before the commencement of this Act, is lawfully employed above ground in connection with any mine from continuing to be employed above ground in connection with a mine; nor
 - (c) Prevent a competent male person above the age of eighteen years who, before the commencement of this Act, is lawfully employed in working the machinery used for lowering and raising persons in a mine from continuing to be so employed;
- in like manner and subject to the same provisions and regulations as before the commencement of this Act, and the provisions of the Acts repealed by this Act, with respect to the employment of such boy or girl or competent male person shall continue to apply accordingly.

Construction of References to repealed Acts.

83. Any enactment or document referring to any Act repealed by this Act, or to any enactment thereof, shall be construed to refer to this Act, and to the corresponding enactments thereof.

Repeal of Acts.

84. The Acts described in Schedule IV. to this Act are hereby repealed.

Provided that this repeal shall not affect any exemption granted, or other thing done or suffered before the commencement of this Act; and all offences committed and penalties incurred and proceedings commenced before the commencement of this Act may be punished, recovered, continued, and completed in the same manner as if this Act had not passed.

SCHEDULES.

SCHEDULE I.

PROCEEDINGS OF BOARD FOR EXAMINATIONS.

1. The board shall meet for the despatch of business, and shall from time to time make such regulations with respect to the summoning notice, place, management, and adjournment of such meetings, and generally with respect to the transaction and management of business, including the quorum at meetings of the board, as they think fit, subject to the following conditions:—

- (a) Any regulations made by the board constituted under the Acts repealed by this Act, and in force at the commencement of this Act, shall continue in force till repealed or altered by the board.
- (b) An extraordinary meeting may be held at any time on the written requisition of three members of the board addressed to the chairman.
- (c) The quorum to be fixed by the board shall consist of less than three members.
- (d) Every question shall be decided by a majority of votes of the members present and voting on that question.
- (e) The names of the members present, as well as those voting upon each question, shall be recorded.
- (f) No business shall be transacted unless notice in writing of such business has been sent to every member of the board seven days at least before the meeting.

2. The board shall from time to time appoint some person to be chairman, and one other person to be vice-chairman.

3. If at any meeting the chairman is not present at the time appointed for holding the same, the vice-chairman shall be the chairman of the meeting; and if neither the chairman nor vice-chairman shall be

present, then the members present shall choose some one of their number to be chairman of such meeting.

4. In case of an equality of votes at any meeting, the chairman for the time being of such meeting shall have a second or casting vote.

5. The appointment of an examiner may be made by a minute of the board signed by the chairman.

6. The board shall keep minutes of their proceedings, which may be inspected or copied by a Secretary of State, or any person authorized by him to inspect or copy the same.

SCHEDULE II.

TABLE of MAXIMUM FEES to be paid in respect of CERTIFICATES.

First-Class Certificate.

By an applicant for examination,
Two pounds.
For copy of certificate, Five shillings.

Second-Class Certificate.

By an applicant for examination,
One pound.
For copy of certificate, Two shillings and sixpence.

[SCHEDULE III.

Coal Mines Regulation Act, 1887,
50 & 51 Vict. c. 58.

FORM OF RETURN.

This Form to be correctly filled up by the Owner, Agent, or Manager, and sent to the Inspector of the District, on behalf of the Secretary of State, on or before 21st January every year.

PART A.

Year ending 31st December 18 .

Name of Mine _____

Situation of Mine _____

County _____

Name of Owner (Company) _____

Name of Manager _____

Name of Under-Manager _____

Postal Address _____

RETURN of PERSONS ordinarily employed during the Year :—

Under ground . . .	Boys of 12 and under 16 . . .	
	Males above 16 . . .	
	Total under ground .	
Above ground (including those employed on sidings and private branch railways and tramways, and in cleaning, washing, and cocking of coal).	Boys of 12 and under 13 . . .	
	Girls do.	
	Boys of 13 and under 16 . . .	
	Girls do.	
	Females above 16	
	Males do.	
	Total above ground .	
	Total number of persons employed under ground and above ground .	

QUANTITY of MINERAL wrought during the Year.

Mineral Wrought.	Number of Statute Tons Wrought.
Coal	
Fireclay	
Ironstone	
Shale—Oil Shale	
Do. used for other purposes	
Copperas Lumps, or Iron Pyrites	
Other Minerals, viz. :—	

The NUMBER of DAYS in EACH MONTH on which COAL or
IRONSTONE has been drawn.

	Number of Days on which was drawn	
	1. Coal.	2. Ironstone.
January		
February		
March		
April		
May		
June		
July		
August		
September		
October		
November		
December		

day of 18 .

(Signed)_____.

SCHEDULE IV.

REPEAL.

Date of Act.	Title of Act.	Extent of Repeal.
35 & 36 Vict. c. 76 [1872].	The Coal Mines Regulation Act, 1872.	The whole Act.
44 & 45 Vict. c. 26 [1881].	The Stratified Ironstone Mines (Gunpowder) Act, 1881.	The whole Act.
49 & 50 Vict. c. 40 [1886].	The Coal Mines Act, 1886.	The whole Act.

FACTORY AND WORKSHOP ACT, 1878.

[41 VICT. CAP. 16.]

An Act to consolidate and amend the Law relating to Factories and Workshops.—[27th May 1878.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

PRELIMINARY.

Short Title.

1. This Act may be cited as the Factory and Workshop Act, 1878.

Commencement of Act.

2. This Act shall come into operation on the 1st January 1879, which day is in this Act referred to as the commencement of this Act: Provided that at any time after the passing of this Act, any appointment, regulation, or order may be made, any notice issued, form prescribed, and act done which appears to a Secretary of State necessary or proper to be made, issued, prescribed, or done for the purpose of bringing this Act into operation at the commencement thereof.

PART I.—GENERAL LAW RELATING TO FACTORIES AND WORKSHOPS.

I. SANITARY PROVISIONS.

Sanitary Condition of Factory and Workshop.

3 A factory and a workshop shall be kept in a cleanly state and free from effluvia arising from any drain, privy, or other nuisance.

A factory or workshop shall not be so overcrowded while work is carried on therein as to be injurious to the health of the persons employed therein, and shall be ventilated in such a manner as to render harmless, so far as is practicable, all the gases, vapours, dust, or other impurities generated in the course of the manufacturing process or handicraft carried on therein that may be injurious to health.

A factory or workshop in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act.

Notice by Inspector to Sanitary Authority of Sanitary Defects in Factory or Workshop.

4. Where it appears to an inspector under this Act that any act, neglect, or default in relation to any drain, watercloset, earthcloset, privy, ash-

pit, water-supply, nuisance, or other matter in a factory or workshop is punishable or remediable under the law relating to public health, but not under this Act, that inspector shall give notice in writing of such act, neglect, or default to the sanitary authority in whose district the factory or workshop is situate, and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice, and take such action thereon, as to that authority may seem proper for the purpose of enforcing the law.

An inspector under this Act may, for the purposes of this section, take with him into a factory or a workshop a medical officer of health, inspector of nuisances, or other officer of the sanitary authority.

II. SAFETY.

Fencing of certain Machinery.

5. With respect to the fencing of machinery in a factory the following provisions shall have effect:—

- (1.) Every hoist or teagle near to which any person is liable to pass or to be employed, and every fly wheel directly connected with the steam or water or other mechanical power, whether in the engine-house or not, and every part of a steam engine and water wheel, shall be securely fenced; and
- (2.) Every wheel-race not otherwise secured shall be securely fenced close to the edge of the wheel-race; and
- (3.) Every part of the mill gearing shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced; and
- (4.) All fencing shall be constantly maintained in an efficient state while the parts required to be fenced are in motion or use for the purpose of any manufacturing process.

A factory in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act.

Fencing of other dangerous Machinery, of which Notice is given by Inspector.

6. Where an inspector considers that in a factory any part of the machinery of any kind moved by steam, water, or other mechanical power, to which the foregoing provisions of this Act with respect to the fencing of machinery do not apply, is not securely fenced, and is so dangerous as to be likely to cause bodily injury to any person employed in the factory, the following provisions shall apply to the fencing of such machinery:—

- (1.) The inspector shall serve on the occupier of the factory a notice requiring him to fence the part of the machinery which the inspector so deems to be dangerous.
- (2.) The occupier, within seven days after the receipt of the notice, may serve on the inspector a requisition to refer the matter to arbitration; and thereupon the matter shall be referred to arbitration, and two skilled arbitrators shall be appointed, the one by the inspector, and the other by the occupier; and the provisions of the Companies Clauses Consolidation Act, 1845, with respect to the settlement of disputes by arbitration, shall, subject to the express provisions of this section, apply to the said arbitration, and the arbitrators or their umpire shall give the decision within twenty-one days after the last of the arbitrators, or, in the case of the umpire, after the umpire is appointed, or within such further time as the occupier and inspector, by writing, allow; and if the decision is not so given, the matter shall be referred to the arbitration of an umpire to be appointed by the judge of the county court within the jurisdiction of which the factory is situate.
- (3.) If the arbitrators or their umpire decide that it is unnecessary or impossible to fence the machinery alleged in the

notice to be dangerous, the notice shall be cancelled, and the occupier shall not be required to fence in pursuance thereof, and the expenses of the arbitration shall be paid as the expenses of the inspectors under this Act.

(4.) If the occupier does not, within the said seven days, serve on the inspector a requisition to refer the matter to arbitration, or does not appoint an arbitrator within seven days after he served that requisition, or if neither the arbitrators nor the umpire decide that it is unnecessary or impossible to fence the machinery alleged in the notice to be dangerous, the occupier shall securely fence the said machinery in accordance with the notice, or with the award of the arbitrators or umpire if it modifies the notice, and the expenses of the arbitration shall be paid by the occupier, and shall be recoverable from him by the inspector in the county court.

(5.) Where the occupier of a factory fails to comply within a reasonable time with the requirements of this section as to securely fencing the said machinery in accordance with the notice or award, or fails to keep the said machinery securely fenced in accordance therewith, or fails constantly to maintain such fencing in an efficient state while the machinery required to be fenced is in motion for the purpose of any manufacturing process, the factory shall be deemed not to be kept in conformity with this Act.

(6.) For the purpose of this section and of any provisions of this Act relating thereto, "machinery" shall be deemed to include any driving strap or band.

Fencing of dangerous Vats or Structures of which Notice is given by Inspector.

7. Where an inspector considers that in a factory or workshop a vat,

pan, or other structure, which is used in the process or handicraft carried on in such factory or workshop, and near to or over which children or young persons are liable to pass or to be employed, is so dangerous, by reason of its being filled with hot liquid or molten metal or otherwise, as to be likely to be a cause of bodily injury to any child or young person employed in the factory or workshop, he shall serve on the occupier of the factory or workshop, a notice requiring him to fence such vat, pan, or other structure.

The provisions of this Act with respect to the fencing of machinery which an inspector considers not to be securely fenced and to be dangerous, shall apply in like manner as if they were re-enacted in this section, with the substitution of the vat, pan, or other structure, for machinery, and with the addition of workshop; and if the occupier of a factory or workshop fails constantly to maintain the fencing required under this section in an efficient state, while such vat, pan, or other structure is so filled or otherwise dangerous as aforesaid, the factory or workshop shall be deemed not to be kept in conformity with this Act.

Fixing of Grindstones securely, and replacing of faulty Grindstone when Notice is given by Inspector.

8. Where an inspector observes in a factory that any grindstone, worked by steam, water, or other mechanical power, is in itself so faulty, or is fixed in so faulty a manner, as to be likely to cause bodily injury to the grinder using the same, he shall serve on the occupier of the factory a notice requiring him to replace such faulty grindstone, or to properly fix the grindstone fixed in the faulty manner.

The provisions of this Act with respect to the fencing of machinery which an inspector considers not to be securely fenced and to be dangerous, shall apply in like manner as if they were re-enacted in this section with the necessary modifications.

Where the occupier of a factory fails to keep the grindstone mentioned in the notice or award in such a state and fixed in such manner as not to be dangerous, the factory shall be deemed not to be kept in conformity with this Act.

Restriction on Cleaning of Machinery while in Motion or Working between Parts of Self-Acting Machinery.

9. A child shall not be allowed to clean any part of the machinery in a factory while the same is in motion by the aid of steam, water, or other mechanical power.

A young person or woman shall not be allowed to clean such part of the machinery in a factory as is mill-gearing while the same is in motion for the purpose of propelling any part of the manufacturing machinery.

A child, young person, or woman shall not be allowed to work between the fixed and traversing part of any self-acting machine while the machine is in motion by the action of steam, water, or other mechanical power.

A child, young person, or woman allowed to clean or to work in contravention of this section, shall be deemed to be employed contrary to the provisions of this Act.

III. EMPLOYMENT AND MEAL HOURS.

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IV. HOLIDAYS.

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V. EDUCATION OF CHILDREN.

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VI. CERTIFICATE OF FITNESS FOR EMPLOYMENT.

Certificate of Fitness for Employment of Children and Young Persons under Sixteen in Factories.

27. In a factory a child or a young person under the age of sixteen years shall not be employed for more than seven, or if the certifying surgeon for the district resides more than

three miles from the factory, thirteen work days, unless the occupier of the factory has obtained a certificate, in the prescribed form, of the fitness of such child or young person for employment in that factory.

A certificate of fitness for employment for the purposes of this Act shall be granted by the certifying surgeon for the district, and shall be to the effect that he is satisfied, by the production of a certificate of birth or other sufficient evidence, that the person named in the certificate of fitness is of the age therein specified, and has been personally examined by him, and is not incapacitated by disease or bodily infirmity for working daily for the time allowed by law in the factory named in the certificate.

Certificate of Fitness for Employment of Children and Young Persons under Sixteen in Workshops.

28. In order to enable occupiers of workshops to better secure the observance of this Act, and prevent the employment in their workshops of children and young persons under the age of sixteen years who are unfitted for that employment, an occupier of a workshop is hereby authorized to obtain, if he thinks fit, from the certifying surgeon for the district, certificates of the fitness of children and of young persons under the age of sixteen years for employment in his workshop, in like manner as if that workshop were a factory, and the certifying surgeon shall examine the children and young persons, and grant certificates accordingly.

Power of Inspector to require Surgical Certificate of Capacity of Child or Young Person under Sixteen for Work.

29. Where an inspector is of opinion that a child or a young person under the age of sixteen years is by disease or bodily infirmity incapacitated for working daily for the time allowed by law in the factory or workshop in which he is employed, he may serve written notice thereof on the occupier of the factory or workshop,

requiring that the employment of such child or young person be discontinued from the period named therein, not being less than one nor more than seven days after the service of such notice, and the occupier shall not continue after the period named in such notice to employ such child or young person (notwithstanding a certificate of fitness has been previously obtained for such child or young person), unless the certifying surgeon for the district has, after the service of the notice, personally examined such child or young person, and has certified that such child or young person is not so incapacitated as aforesaid.

Supplemental Provisions as to Certificates of Fitness for Employment.

30. All factories and workshops in the occupation of the same occupier, and in the district of the same certifying surgeon, or any of them, may be named in the certificate of fitness for employment, if the surgeon is of opinion that he can truly give the certificate for employment therein.

The certificate of birth (which may be produced to a certifying surgeon) shall either be a certified copy of the entry in the register of births, kept in pursuance of the Acts relating to the registration of births, of the birth of the child or young person (whether such copy be obtained in pursuance of the Elementary Education Act, 1876, or otherwise), or be a certificate from a local authority within the meaning of the Elementary Education Act, 1876, to the effect that it appears from the returns transmitted to such authority in pursuance of the said Act by the register of births and deaths that the child was born at the date named in the certificate.

Where a certificate of fitness for employment is to the effect that the certifying surgeon has been satisfied of the age of a child or young person by evidence other than the production of a certificate of birth, an inspector may, by notice in writing, annul the surgeon's certificate, if he has reasonable cause to

believe that the real age of the child or young person named in it is less than that mentioned in the certificate, and thereupon that certificate shall be of no avail for the purposes of this Act.

When a child becomes a young person a fresh certificate of fitness must be obtained.

The occupier shall, when required, produce to an inspector at the factory or workshop in which a child or young person is employed, the certificate of fitness of such child or young person for employment, which he is required to obtain under this Act.

VII. ACCIDENTS.

Notice of Accidents causing Death or bodily Injury.

31. Where there occurs in a factory or a workshop any accident which either—

(a) causes loss of life to a person employed in the factory or in the workshop; or

(b) causes bodily injury to a person employed in the factory or in the workshop, and is produced either by machinery moved by steam, water, or other mechanical power, or through a vat, pan, or other structure filled with hot liquid or molten metal or other substance, or by explosion, or by escape of gas, steam, or metal, and is of such a nature as to prevent the person injured by it from returning to his work in the factory or workshop within forty-eight hours after the occurrence of the accident,

written notice of the accident shall forthwith be sent to the inspector and to the certifying surgeon for the district, stating the residence of the person killed or injured, or the place to which he may have been removed; and if any such notice is not sent, the occupier of the factory or workshop shall be liable to a fine not exceeding five pounds.

If any such accident as aforesaid occurs to a person employed in an iron mill or blast furnace, or other factory or workshop where the

occupier is not the actual employer of the person killed or injured, the actual employer shall immediately report the same to the occupier, and in default shall be liable to a fine not exceeding five pounds.

A notice of an accident, of which notice is required by section sixty-three of the Explosives Act, 1875, to be sent to a Government inspector, need not be sent to the certifying surgeon in pursuance of this section.

Investigation of and Report on Accidents by certifying Surgeon.

32. Where a certifying surgeon receives in pursuance of this Act notice of an accident in a factory or a workshop, he shall with the least possible delay proceed to the factory or workshop, and make a full investigation as to the nature and cause of the death or injury caused by that accident, and within the next twenty-four hours send to the inspector a report thereof.

The certifying surgeon, for the purpose only of an investigation under this section, shall have the same powers as an inspector, and shall also have power to enter any room in a building to which the person killed or injured has been removed.

There shall be paid to the said surgeon for the investigation such fee, not exceeding ten nor less than three shillings, as a Secretary of State considers reasonable, which fee shall be paid as expenses incurred by a Secretary of State in the execution of this Act.

PART II.—SPECIAL PROVISIONS RELATING TO PARTICULAR CLASSES OF FACTORIES AND WORKSHOPS.

PART III.—ADMINISTRATION, PENALTIES, AND LEGAL PROCEEDINGS.

IV. FINES.

Fine for not keeping Factory or Workshop in Conformity with Act.

81. If a factory or workshop is not kept in conformity with this Act, the occupier thereof shall be

liable to a fine not exceeding ten pounds.

The court of summary jurisdiction, in addition to or instead of inflicting such fine, may order certain means to be adopted by the occupier, within the time named in the order, for the purpose of bringing his factory or workshop into conformity with this Act; the court may, upon application, enlarge the time so named; but if, after the expiration of the time as originally named or enlarged by subsequent order, the order is not complied with, the occupier shall be liable to a fine not exceeding one pound for every day that such non-compliance continues.

Penal Compensation to Person injured by want of Fence to Machinery, etc.

82. If any person is killed or suffers any bodily injury in consequence of the occupier of a factory having neglected to fence any machinery required by or in pursuance of this Act to be securely fenced, or having neglected to maintain such fencing, or in consequence of the occupier of a factory or workshop having neglected to fence any vat, pan, or other structure required by or in pursuance of this Act to be securely fenced, or having neglected to maintain such fencing, the occupier of the factory or workshop shall be liable to a fine not exceeding one hundred pounds, the whole or any part of which may be applied for the benefit of the injured person or his family, or otherwise as a Secretary of State determines:

Provided that the occupier of a factory shall not be liable to a fine under this section if an information against him for not fencing the part of the machinery, or the vat, pan, or other structure, by which the death or bodily injury was inflicted, has been heard and dismissed previous to the time when the death or bodily injury was inflicted.

Fine for employing Children, Young Persons, and Women contrary to the Act.

83. Where a child, young person, or woman is employed in a factory

or workshop contrary to the provisions of this Act, the occupier of the factory or workshop shall be liable to a fine not exceeding three, or if the offence was committed during the night, five pounds for each child, young person, or woman so employed; and where a child, young person, or woman is so employed in a factory or workshop within the meaning of section sixteen of this Act, the occupier shall be liable to a fine not exceeding one, or if the offence was committed during the night, two pounds for each child, young person, or woman so employed.

A child, young person, or woman who is not allowed times for meals and absence from work as required by this Act, or during any part of the times allowed for meals and absence from work is, in contravention of the provision of this Act, employed in the factory or workshop, or allowed to remain in any room, shall be deemed to be employed contrary to the provisions of this Act.

Fine on Parent for allowing Child or Young Person to be employed contrary to the Act, or neglecting to cause Child to attend School.

84. The parent of a child or young person shall,—

(1.) If such child or young person is employed in a factory or workshop contrary to the provisions of this Act, be liable to a fine not exceeding twenty shillings for each offence, unless it appears to the court that such offence was committed without the consent, connivance, or wilful default of such parent; and

(2.) If he neglects to cause such child to attend school in accordance with this Act, be liable to a fine not exceeding twenty shillings for each offence.

Forgery of Certificates, false Entries and Declarations.

85. Every person who forges or counterfeits any certificate for the purposes of this Act (for the forgery or counterfeiting of which no other

punishment is provided), or who gives or signs any such certificate knowing the same to be false in any material particular, or who knowingly utters or makes use of any certificate so forged, counterfeited, or false as aforesaid, or who knowingly utters or makes use of as applying to any person a certificate which does not so apply, or who personates any person named in a certificate, or who wilfully connives at the forging, counterfeiting, giving, signing, uttering, making use, or personating as aforesaid, shall be liable to a fine not exceeding twenty pounds, or to imprisonment for a term not exceeding three months with or without hard labour.

Every person who wilfully makes a false entry in any register, notice, certificate, or document required by this Act to be kept or served or sent, or who wilfully makes or signs a false declaration under this Act, or who knowingly makes use of any such false entry or declaration, shall be liable to a fine not exceeding twenty pounds, or to imprisonment for a term not exceeding three months with or without hard labour.

Fine on Person committing Offence for which Occupier is liable.

86. Where an offence for which the occupier of a factory or workshop is liable under this Act to a fine, has in fact been committed by some agent, servant, workman, or other person, such agent, servant, workman, or other person shall be liable to the same fine as if he were the occupier.

Power of Occupier to exempt himself from Fine on Conviction of the actual Offender.

87. Where the occupier of a factory or workshop is charged with an offence against this Act, he shall be entitled upon information duly laid by him to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the occupier of the

factory or workshop proves to the satisfaction of the court that he had used due diligence to enforce the execution of the Act, and that the said other person had committed the offence in question without his knowledge, consent, or connivance, the said other person shall be summarily convicted of such offence, and the occupier shall be exempt from any fine.

When it is made to appear to the satisfaction of an inspector at the time of discovering the offence, that the occupier of the factory or workshop had used all due diligence to enforce the execution of this Act, and also by what person such offence had been committed, and also that it had been committed without the knowledge, consent, or connivance of the occupier and in contravention of his orders, then the inspector shall proceed against the person whom he believes to be the actual offender in the first instance, without first proceeding against the occupier of the factory or workshop.

Restraint on Cumulative Fines.

88. A person shall not be liable in respect of a repetition of the same kind of offence from day to day to any larger amount of fines than the highest fine fixed by this Act for the offence, except—

- (a) where the repetition of the offence occurs after an information has been laid for the previous offence; or
- (b) where the offence is one of employing two or more children, young persons, or women contrary to the provisions of this Act.

V. LEGAL PROCEEDINGS.

Prosecution of Offences and Recovery and Application of Fines.

89. All offences under this Act shall be prosecuted, and all Fines under this Act shall be recovered, on summary conviction before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.

A summary order may be made for the purposes of this Act by a court of summary jurisdiction in manner provided by the Summary Jurisdiction Acts.

All fines imposed in pursuance of this Act shall, save as otherwise expressly provided by this Act, be paid into the Exchequer.

The court of summary jurisdiction, when hearing and determining a case arising under this Act, shall be constituted either of two or more justices of the peace sitting at some court or public place at which justices are for the time being accustomed to assemble for the purpose of holding petty sessions, or of some magistrate or officer sitting alone or with others at some court or other place appointed for the public administration of justice, and for the time being empowered by law to do alone any act authorized to be done by more than one justice of the peace.

Where a proceeding is taken before a court of summary jurisdiction with respect to an offence against this Act alleged to be committed in or with reference to a factory or workshop, the occupier of that factory or workshop, and the father, son, or brother of such occupier, shall not be qualified to act as a member of such court.

Appeal to Quarter Sessions.

90. If any person feels aggrieved by a conviction or order made by a court of summary jurisdiction on determining an information or complaint under this Act, he may appeal therefrom.

Limitation of Time and general Provisions as to Summary Proceedings.

91. The following provisions shall have effect with respect to summary proceedings for offences and fines under this Act:—

- (1.) The information shall be laid within two months, or, where the offence is punishable at discretion by imprisonment, or is a breach of the provisions of this Act with respect to holi-

- days, within three months after the commission of the offence.
- (2.) The description of an offence in the words of this Act, or in similar words, shall be sufficient in law.
- (3.) Any exception, exemption, proviso, excuse, or qualification, whether it does or not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant.
- (4.) It shall be sufficient to allege that a factory or workshop is a factory or workshop within the meaning of this Act, without more.
- (5.) It shall be sufficient to state the name of the ostensible occupier of the factory or workshop, or the title of the firm by which the occupier employing persons in the factory or workshop is usually known.
- (6.) A conviction or order made in any matter arising under this Act, either originally or on appeal, shall not be quashed for want of form, and a conviction or order made by a court of summary jurisdiction against which a person is authorized by this Act to appeal, shall not be removed by certiorari or otherwise, either at the instance of the Crown or of any private person, into a superior court, except for the purpose of the hearing and determination of a special case.

Evidence in Summary Proceedings.

92. If a person is found in a factory, except at meal times, or while all the machinery of the factory is stopped, or for the sole purpose of bringing food to the persons employed in the factory between the hours of four and five o'clock in the afternoon, such person shall, until the contrary is proved, be deemed

for the purposes of this Act to have been then employed in the factory :

Provided that yards, playgrounds, and places open to the public view, schoolrooms, waiting rooms, and other rooms belonging to the factory in which no machinery is used or manufacturing process carried on, shall not be taken to be any part of the factory within the meaning of this enactment ; and this enactment shall not apply to a factory or workshop to which the provisions of this Act with respect to the affixing of notices do not apply.

Where a child or young person is, in the opinion of the court, apparently of the age alleged by the informant, it shall lie on the defendant to prove that the child or young person is not of that age.

A declaration in writing by a certifying surgeon for the district that he has personally examined a person employed in a factory or workshop in that district, and believes him to be under the age set forth in the declaration, shall be admissible in evidence of the age of that person.

A copy of a conviction for an offence against this Act purporting to be certified under the hand of the clerk of the peace having the custody of such conviction to be a true copy shall be receivable as evidence, and every such clerk of the peace shall, upon the written request of an inspector and payment of a fee of one shilling, deliver to him a copy of the conviction so certified.

PART IV.—DEFINITIONS, SAVINGS, APPLICATION TO SCOTLAND AND IRELAND, AND REPEAL.

I. DEFINITIONS.

Factories and Workshops to which Act applies.

93. The expression "textile factory" in this Act means—any premises wherein or within the close or curtilage of which steam, water, or other mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of, cotton,

wool, hair, silk, flax, hemp, jute, tow, china-glass, cocoa-nut fibre, or other like material, either separately or mixed together, or mixed with any other material, or any fabric made thereof :

Provided that print works, bleaching and dyeing works, lace warehouses, paper mills, flax scutch mills, rope works, and hat works shall not be deemed to be textile factories.

The expression "non-textile factory" in this Act means—

(1.) any works, warehouses, furnaces, mills, foundries, or places named in Part One of the Fourth Schedule to this Act,

(2.) also any premises or places named in Part Two of the said schedule wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there,

(3.) also any premises wherein, or within the close or curtilage or precincts of which, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes, or any of them; that is to say,—

(a) in or incidental to the making of any article or of part of any article; or

(b) in or incidental to the altering, repairing, ornamenting, or finishing of any article; or

(c) in or incidental to the for sale of any article, and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

The expression "factory" in this Act means textile factory and non-textile factory, or either of such descriptions of factories.

The expression "workshop" in this Act means—

(1.) any premises or places named in Part Two of the Fourth Schedule to this Act, which are not a factory within the meaning of this Act,

(2.) also any premises, room, or place not being a factory within the meaning of this Act, in which premises, room, or place, or within the close or curtilage or precincts of which premises, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes, or any of them; that is to say,—

(a) in or incidental to the making of any article or of part of any article; or

(b) in or incidental to the altering, repairing, ornamenting, or finishing of any article; or

(c) in or incidental to the adapting for sale of any article,

and to which or over which premises, room, or place the employer of the persons working therein has the right of access or control.

A part of a factory or workshop may for the purposes of this Act be taken to be a separate factory or workshop; and a place solely used as a dwelling shall not be deemed to form part of the factory or workshop for the purposes of this Act.

Where a place situate within the close, curtilage, or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, such place shall not be deemed to form part of that factory or workshop for the purposes of this Act, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop, and be regulated accordingly.

Any premises or place shall not be excluded from the definition of a factory or workshop by reason only that such premises or place are or is in the open air.

This Act shall not apply to such workshops, other than bakehouses, as are conducted on the system of not employing any child, young person, or woman therein, but save as aforesaid applies to all factories and workshops as before defined, inclusive of factories and workshops be-

longing to the Crown: Provided that in case of any public emergency a Secretary of State may exempt a factory or workshop belonging to the Crown from this Act to the extent and during the period named by him.

The exercise by any child or young person in any recognised efficient school during a portion of the school hours of any manual labour for the purpose of instructing such child or young person in any art or handicraft, shall not be deemed to be an exercise of manual labour for the purpose of gain within the meaning of this Act.

Definition of Employment and Working for Hire.

94. A child, young person, or woman who works in a factory or workshop, whether for wages or not, either in a manufacturing process or handicraft, or in cleaning any part of the factory or workshop used for any manufacturing process or handicraft, or in cleaning or oiling any part of the machinery, or in any other kind of work whatsoever incidental to or connected with the manufacturing process or handicraft, or connected with the article made or otherwise the subject of the manufacturing process or handicraft therein, shall, save as is otherwise provided by this Act, be deemed to be employed therein within the meaning of this Act.

For the purposes of this Act an apprentice shall be deemed to work for hire.

Definition of "Certified efficient School." Definition of "Recognised efficient School."

95. The expression "certified efficient school" in this Act means a public elementary school within the meaning of the Elementary Education Acts, 1870 and 1873, and any workhouse school in England certified to be efficient by the Local Government Board, and also any elementary school which is not conducted for private profit and is open at all reasonable times to the inspection of Her Majesty's inspectors of schools, and requires the like attend-

ance from its scholars as is required in a public elementary school, and keeps such registers of those attendances as may be for the time being required by the Education Department, and is certified by the Education Department to be an efficient school; and the expression "recognised efficient school" means a certified efficient school as above defined, and also any school which the Education Department have not refused to take into consideration under the Elementary Education Act, 1870, as a school giving efficient elementary education to and suitable for the children of a school district, and which is recognised for the time being by an inspector under this Act as giving efficient elementary education, and the inspector shall immediately report to the Education Department every school so recognised by him.

General Definitions.

96. In this Act, unless the context otherwise requires,—

The expression "child" means a person under the age of fourteen years.

The expression "young person" means a person of the age of fourteen years and under the age of eighteen years.

The expression "woman" means a woman of eighteen years of age and upwards.

The expression "parent" means a parent or guardian of, or person having the legal custody of, or the control over, or having direct benefit from the wages, of a child or young person.

The expression "Treasury" means the Commissioners of Her Majesty's Treasury.

The expression "Secretary of State" means one of Her Majesty's Principal Secretaries of State.

The expression "Education Department" means the Lords of the Committee of the Privy Council on Education.

The expression "sanitary authority" means an urban or rural sanitary authority within the meaning of the Public Health

Act, 1875, and any commissions, board, or vestry in the metropolis having the like powers as such urban sanitary authority.

The expression "person" includes a body of persons corporate or unincorporate.

The expression "week" means the period between midnight on Saturday night and midnight on the succeeding Saturday night.

The expression "night" means the period between nine o'clock in the evening and six o'clock in the succeeding morning.

The expression "prescribed" means prescribed for the time being by a Secretary of State.

The expression "Summary Jurisdiction Acts" means the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-three, intituled "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders," and any Acts amending the same.

The expression "court of summary jurisdiction" means any justice or justices of the peace, metropolitan police magistrate, stipendiary or other magistrate, or officer, by whatever name called, to whom jurisdiction is given by the Summary Jurisdiction Acts or any Acts therein referred to.

The expression "mill-gearing" comprehends every shaft, whether upright, oblique, or horizontal, and every wheel, drum, or pulley by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process.

The factories and workshops named in the Fourth Schedule to this Act are in this Act referred to by the names therein assigned to them.

Special Exemption of certain Trades.

III. APPLICATION OF ACT TO SCOTLAND AND IRELAND.

Certificates of Birth for Purposes of Act.

104. Where the age of the child is required to be ascertained or proved for the purposes of this Act, or for any purpose connected with the elementary education or employment in labour of such child, any person, on presenting a written requisition in such form and containing such particulars as may be from time to time prescribed by a Secretary of State, and on payment of such fee, not exceeding one shilling, as a Secretary of State from time to time fixes, shall be entitled to obtain—

- (1.) In Scotland an extract under the hand of the registrar under the Act of the seventeenth and eighteenth years of Her present Majesty, chapter eighty, and any Acts amending the same, of the entry in the register kept under those Acts; and
- (2.) In Ireland a certified copy under the hand of the registrar or superintendent registrar under the Registration of Births and Deaths (Ireland) Act, of the entry in the register under the Act of the birth of the child named in the requisition.

Application of Act to Scotland.

105. In the application of this Act to Scotland—

- (1.) The expression "certified efficient school" means any public or other elementary school under Government inspection.
- (2.) In lieu of Christmas Day and either Good Friday or the next public holiday under the Holidays Extension Act, 1875, there shall be allowed as a holiday to every child, young person, and women employed in a factory or workshop the whole of two days separated from each other by an interval of not less than three months, one of which

shall be a day set apart by the Church of Scotland for the observance of the sacramental fast in the parish in which the factory or workshop is situate, or some other day substituted for such day as aforesaid by the occupier specifying the same in the notice affixed in the factory or workshop.

- (3.) The expression "sanitary authority" means the local authority under the Public Health (Scotland) Act, 1867.
- (4.) The expression "medical officer of health" means the medical officer under the Public Health (Scotland) Act, 1867, or where no such officer has been appointed, the medical officer appointed by the parochial board.
The expression "poor law medical officer" means the medical officer appointed by the parochial board.
- (5.) The expression "Companies Clauses Consolidation Act, 1845," means the Companies Clauses Consolidation (Scotland) Act, 1845.
- (6.) The expression "Summary Jurisdiction Acts," means the Summary Procedure Act, 1864, and any Acts amending the same.
- (7.) The expression "court of summary jurisdiction" means the sheriff of the county or any of his substitutes.
- (8.) The expression "Education Department" means the Lords of the Committee of the Privy Council appointed by Her Majesty on Education in Scotland.
- (9.) The expression "county court" means the sheriff court.
- (10.) All matters required by this Act to be published in the *London Gazette* shall (if they relate exclusively to Scotland), instead of being published in the *London Gazette*, be published in the *Edinburgh Gazette* only.
- (11.) The expression "information" means petition or complaint.
- (12.) The expression "informant"

means petitioner, pursuer, or complainer.

- (13.) The expression "defendant" means defender or respondent.
- (14.) The expression "clerk of the peace" means sheriff-clerk.
- (15.) All offences under this Act shall be prosecuted, and all penalties under this Act shall be recovered, under the provisions of the Summary Jurisdiction Acts at the instance of the procurator-fiscal or of an inspector under this Act.
- (16.) The court may make, and may also from time to time alter or vary, summary orders under this Act on petition by such procurator-fiscal or inspector presented in common form.
- (17.) All fines under this Act in default of payment, and all orders made under this Act failing compliance, may be enforced by imprisonment for a term to be specified in the order or conviction, but not exceeding three months.
- (18.) It shall be no objection to the competency of an inspector to give evidence as a witness in any prosecution for offences under this Act, that such prosecution is brought at the instance of such inspector.
- (19.) Every person convicted of an offence under this Act shall be liable in the reasonable costs and charges of such conviction.
- (20.) All penalties imposed and recovered under this Act shall be paid to the clerk of the court, and by him accounted for and paid to the Queen's and Lord Treasurer's Remembrancer, on behalf of Her Majesty's Exchequer, and shall be carried to the Consolidated Fund.
- (21.) All jurisdictions, powers, and authorities necessary for the purposes of this section are conferred on the sheriffs and their substitutes.
- (22.) Any person may appeal from any order or conviction under this Act to the Court of Justiciary, under and in terms of the Act of the twentieth year of the reign of His Majesty King

George the Second, chapter forty-three, or under any enactment amending that Act, or applying or incorporating its provisions, or any of them, with regard to appeals, or to the Court of Justiciary at Edinburgh under and in terms of the Summary Prosecutions Appeal (Scotland) Act, 1875.

IV. REPEAL.

SCHEDULES.

FOURTH SCHEDULE.

LIST OF FACTORIES AND WORKSHOPS.

PART I.—NON-TEXTILE FACTORIES.

(1.) "Print works," that is to say, any premises in which any persons are employed to print figures, patterns, or designs upon any cotton, linen, woollen, worsted, or silken yarn, or upon any woven or felted fabric not being paper.

(2.) "Bleaching and dyeing works," that is to say, any premises in which the processes of bleaching, beetling, dyeing, calendering, finishing, hooking, lapping, and making up and packing any yarn or cloth of any material, or the dressing or finishing of lace, or any one or more of such processes, or any process incidental thereto, are or is carried on.

(3.) "Earthenware works," that is to say, any place in which persons work for hire in making, or assisting in making, finishing, or assisting in finishing, earthenware of any description, except bricks and tiles not being ornamental tiles.

(4.) "Lucifer-match works," that is to say, any place in which persons work for hire in making lucifer matches, or in mixing the chemical materials for making them, or in any process incidental to making lucifer matches, except the cutting of the wood.

(5.) "Percussion-cap works," that is to say, any place in which persons work for hire in making percussion caps, or in mixing or storing the chemical materials for making them, or in any process incidental to making percussion caps.

(6.) "Cartridge works," that is to say, any place in which persons work for hire in making cartridges, or in any process incidental to making cartridges, except the manufacture of the paper or other material that is used in making the cases of the cartridges.

(7.) "Paper-staining works," that is to say, any place in which persons work for hire in printing a pattern in colours upon sheets of paper, either by blocks applied by hand, or by rollers worked by steam, water, or other mechanical power.

(8.) "Fustian-cutting works," that is to say, any place in which persons work for hire in fustian cutting.

(9.) "Blast furnaces," that is to say, any blast furnace or other furnace or premises in or on which the process of smelting or otherwise obtaining any metal from the ores is carried on.

(10.) "Copper mills."

(11.) "Iron mills," that is to say, any mill, forge, or other premises, in or on which any process is carried on for converting iron into malleable iron, steel, or in plate, or for otherwise making or converting steel.

(12.) "Foundries," that is to say, iron foundries, copper foundries, brass foundries, and other premises or places in which the process of founding or casting any metal is carried on; except any premises or places in which such process is carried on by not more than five persons and as subsidiary to the repair or completion of some other work.

(13.) "Metal and india-rubber works," that is to say, any premises in which steam, water, or other mechanical power is used for moving machinery employed in the manufacture of machinery, or in the manufacture of any article of metal not being machinery, or in the manufacture of india-rubber or gutta-

percha, or of articles made wholly or partially of india-rubber or gutta-percha.

(14.) "Paper mills," that is to say, any premises in which the manufacture of paper is carried on.

(15.) "Glass works," that is to say, any premises in which the manufacture of glass is carried on.

(16.) "Tobacco factories," that is to say, any premises in which the manufacture of tobacco is carried on.

(17.) "Letter - press printing works," that is to say, any premises in which the process of letter-press printing is carried on.

(18.) "Bookbinding works," that is to say, any premises in which the process of bookbinding is carried on.

(19.) Flax scutch mills.

PART II.—NON-TEXTILE FACTORIES AND WORKSHOPS.

(20.) "Hat works," that is to say, any premises in which the manufacture of hats or any process incidental to their manufacture is carried on.

(21.) "Rope works," that is to say, any premises being a ropery, ropewalk, or rope work, in which is carried on the laying or twisting or other process of preparing or finishing the lines, twines, cords, or ropes, and in which machinery moved by steam, water, or other mechanical power is not used for drawing or spinning the fibres of

flax, hemp, jute, or tow, and which has no internal communication with any buildings or premises joining or forming part of a textile factory, except such communication as is necessary for the transmission of power.

(22.) "Bakehouses," that is to say, any places in which are baked bread, biscuits or confectionery, from the baking or selling of which a profit is derived.

(23.) "Lace warehouses," that is to say, any premises, room, or place not included in bleaching and dyeing works as hereinbefore defined, in which persons are employed upon any manufacturing process or handicraft in relation to lace, subsequent to the making of lace upon a lace machine moved by steam, water, or other mechanical power.

(24.) "Shipbuilding yards," that is to say, any premises in which any ships, boats, or vessel used in navigation are made, finished, or repaired.

(25.) "Quarries," that is to say, any place, not being a mine, in which persons work in getting slate, stone, coprolites, or other minerals.

(26.) "Pit-banks," that is to say, any place above ground adjacent to a shaft of a mine, in which place the employment of women is not regulated by the Coal Mines Regulation Act, 1872, or the Metalliferous Mines Regulation Act, 1872, whether such place does or does not form part of the mine within the meaning of those Acts.

EMPLOYERS' LIABILITY ACT, 1880.

[43 & 44 VICT. CAP. 42.]

An Act to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Workmen in their Service.—[7th September 1880.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Com-

mons, in this present Parliament assembled, and by the authority of the same, as follows:

Amendment of Law.

1. Where after the commencement of this Act personal injury is caused to a workman

(1.) By reason of any defect in the condition of the ways, works, machinery, or plant

- connected with, or used in the business of the employer; or
- (2.) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or
 - (3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or
 - (4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or byelaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or
 - (5.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway,

the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

Exceptions to Amendment of Law.

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases; that is to say,—

- (1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that

the ways, works, machinery, or plant were in proper condition.

- (2.) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, byelaws, or instructions therein mentioned; provided that where a rule or byelaw has been approved or has been accepted as a proper rule or byelaw by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or byelaw.
- (3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

Limit of Sum Recoverable as Compensation.

3. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

Limit of Time for Recovery of Compensation.

4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death:

Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

Money Payable under Penalty to be deducted from Compensation under Act.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action.

Trial of Actions.

6. (1.) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed to a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed.

(2.) Upon the trial of any such action in a county court before the judge without a jury one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3.) For the purpose of regulating the conditions and mode of appointment and remuneration of such

assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

"County court" shall, with respect to Scotland, mean the "Sheriff's Court," and shall, with respect to Ireland, mean the "Civil Bill Court."

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877.

In Scotland the sheriff may join actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

Mode of serving Notice of Injury.

7. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate,

the notice shall be served by delivering the same at, or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

Definitions.

8. For the purposes of this Act, unless the context otherwise requires,—

The expression “person who has superintendence entrusted to him” means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour.

The expression “employer” includes a body of persons corporate or unincorporate.

The expression “workman” means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies.

Commencement of Act.

9. This Act shall not come into operation until the 1st January 1881, which date is in this Act referred to as the commencement of this Act.

Short Title.

10. This Act may be cited as the Employers’ Liability Act, 1880, and shall continue in force till the 31st December 1887, and to the end of the then next Session of Parliament, and no longer, unless Parliament shall otherwise determine; and all actions commenced under this Act before that period shall be continued as if the said Act had not expired.

EMPLOYERS’ LIABILITY ACT, 1880; CONTINUANCE ACT, 1888.

[51 & 52 VICT. CAP. 58.]

An Act to continue the Employers’ Liability Act, 1880. — [24th December 1888.]

BE it enacted by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament

assembled, and by the authority of the same, as follows:

Continuance of 43 & 44 Vict. c. 42.

1. The Employers’ Liability Act, 1880, shall be continued until the thirty-first day of December one thousand eight hundred and eighty-nine.

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